No. .....

Supreme Court, U.S.
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CLERK

In The

# Supreme Court of the United States

October Term, 1986

HUNTER DOUGLAS, INC.,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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February 26, 1987

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## QUESTIONS PRESENTED

1. Where the United States District Court rules in an injunction proceeding under Section 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), that there is no reasonable cause to believe that an employer has violated the Act, does that ruling preclude a subsequent contrary determination of the same issue by the NLRB when the record for the Section 10(j) and administrative proceedings is identical and the NLRB does not appeal the ruling of the District Court?

2. Whether the Court of Appeals, in reviewing a decision of the NLRB, may refuse to consider the prior, contrary, and unappealed decision of the United States District Court in a Section 10(j) proceeding, where both decisions were based upon the identical evidentiary record?

3. In a "mixed motive" discharge case, may the NLRB presume a *prima facie* case and rely on facts raised in the employer's affirmative defense to support its burden of proof?

## INTERESTED PARTIES

### Rule 28 1 List

The parties set forth in the caption of this Petition for Writ of Certiorari are the interested parties.

The parent company of Petitioner Hunter Douglas, Inc. is Hunter Douglas N.V. Hunter Douglas' affiliates and subsidiaries (other than wholly owned subsidiaries) are:

Hunter Douglas Argentina S.A.

Hunter Douglas Limited

Hunter Douglas, Vienna

Hunter Douglas Belgium N.V.

Hunter Douglas do Brasil Ltda.

Wotan S.A. Maquinas Operatrizes

Hunter Douglas Canada Limited

Industrias Metalicas Chile S.A.

Hunter Douglas de Colombia S.A.

Hunter Douglas S.a.r.l.

Filtrasol Stores Deco S.A.

Filtrasol Paris S.a r.l.

Hunter Douglas G.m.b.H.

Hunter Douglas Metals G.m.b.H.

Hunter Douglas Metalldecken Producktion G.m.b.H.

Hunter Douglas Bauelemente G.m.b.H.

Wotan-Werke G.m.b.H.

Hunter Douglas (Asia) Limited

Hunter Douglas (Hong Kong) Ltd.

Hunter Douglas Italia SpA.

Hunter Douglas Japan Ltd.

Hunter Douglas Metals Japan Ltd.

Hunter Douglas (Malaysia) Sdn Bhd

Hunter Douglas de Mexico S.A., de C.V.

Hunter Douglas Europe B.V.

Hunter Douglas Metals B.V.

A.B.N. (Assemblage Bedrijf Nederland) B.V.

European Metal Shredding (EMES) B.V.

Hadecora B.V.

HCI Holland Coatings Industries B.V.

Laagland B.V.

B.V. Nederlandse Aluminum Maatschappij-Nedal

Nederlandse Assemblage Kombinatie (N.A.K.) B.V.

Hunter Douglas International N.V.

Hunter Douglas Limited (New Zealand)

Hunter Douglas Panama S.A.

Hunter Douglas Singapore (Pte.) Ltd.

Hunter Douglas Espana S.A.

Hunter Douglas Scandinavia

Hunter Douglas Metals S.A.

Hunter Douglas A.G.

Hunter Douglas Limited

Hunter Douglas Metals

Soag Machinery Limited

Custom Bilt Products, Inc.

Hunter Douglas Architectural Products Inc.

Hunter Douglas Metals Inc.

Wotan Machine Tools

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Hunter Douglas, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

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## OPINIONS BELOW

The opinion of the Court of Appeals was entered on November 6, 1986 and is reported as *Hunter Douglas, Inc.*

*v. NLRB,* 804 F.2d 808 (3d Cir. 1986); it is reproduced as Appendix A (1a to 30a). The decision of the Court of Appeals denying a Petition for Rehearing and Suggestion for Rehearing en banc was entered on December 2, 1986 and is currently unreported; it is reproduced as Appendix I (101a). The decision of the National Labor Relations Board was entered on December 23, 1985, and is reported at 277 N.L.R.B. No. 123; it is reproduced as Appendix G (85a to 96a). The opinion of the United States District Court for the District of New Jersey in the related Section 10(j) proceeding was entered on March 29, 1985 and is unreported; it is reproduced as Appendix C (33a to 53a). A subsequent Order was entered by the District Court on April 9, 1985 and is also unreported; it is reproduced as Appendix D (54a to 56a).

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## JURISDICTION

The order denying rehearing was entered on December 2, 1986. App. I at 101a. This petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## STATUTES INVOLVED

The statute involved in this Petition is the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151 *et seq.*, particularly Sections 7, 8(a)(1), (2), and (3), and

10(f) and (j) of the Act, 29 U.S.C. §§ 157, 158(a)(1), (2), and (3), and 160(f) and (j).

29 U.S.C.§ 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title.

29 U.S.C. § 158 provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

29 U.S.C. § 160(f) and (j) provide in pertinent part:

> (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the re-

lief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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## STATEMENT OF THE CASE

### A. Introduction

This case concerns a decision by the United States District Court for the District of New Jersey that there was no reasonable cause to believe that petitioner Hunter Douglas had violated the NLRA by eliminating the second shift at its Maywood, New Jersey plant and a subsequent decision by the NLRB based on the identical record that such conduct had violated sections 8(a)(1) and (3) of the Act.[1]

An Administrative Law Judge ("ALJ") found in favor of Hunter Douglas on three issues, including the elimination of the second shift. The ALJ also found in favor of the Board on several remaining issues which Hunter Douglas did not contest. The NLRB subsequently reversed the ALJ on all three contested issues including the second shift layoff. The Court of Appeals affirmed the NLRB's decision.

Following the hearing before the ALJ, but before the ALJ issued his decision, the NLRB sought temporary injunctive relief in the District Court pursuant to Section 10(j) of the Act. At the Board's request, the District Court based its decision solely on the complete record developed before the ALJ. Based upon that record, which was

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[1] Hunter Douglas was also accused of violating the Act by promulgating a no solicitation - no distribution rule, forming employee committees, soliciting employee grievances and granting benefits, interrogating one employee, and discharging the second shift supervisor. Only the layoff remains as a significant issue. The layoff and other acts complained of occurred during an incipient union organizing campaign and before the union demanded recognition.

also later before the Board, the District Court decided that although there was sufficient evidence presented in the record to grant an injunction as to certain activities, there was no reasonable cause to believe that Hunter Douglas had violated the Act by eliminating the second shift. The Board did not appeal the District Court's decision.

Subsequently, the ALJ also found, *inter alia*, that Hunter Douglas had not violated the Act by eliminating the second shift. Nevertheless, the NLRB, relying on the identical record that had been before the District Court, reversed the ALJ's conclusion that Hunter Douglas had not violated Section 8(a)(3) by eliminating its second shift. In a split decision (Judge Weis dissenting), the Third Circuit upheld the NLRB's decision. In so doing, the Third Circuit explicitly refused to consider the decision of the District Court that there was no reasonable cause to believe that Hunter Douglas had violated the Act by eliminating the second shift.

**B. Statement of Facts**

Hunter Douglas is in the business of distributing window covering manufacturing equipment and window covering components. Although it manufactures a limited amount of window coverings itself, Hunter Douglas primarily sells its products through a network of licensed, independent fabricators, a marketing strategy that it has followed for a number of years.

In the spring and summer of 1984, Hunter Douglas intensified its efforts to have all retail orders handled by its network of independent fabricators. Anticipating that the intensified implementation of its marketing strategy would result in excess production capacity, Hunter Doug-

las took a number of steps to reduce its own manufacturing capacity. Management personnel were reduced by 50% and similar cuts in space requirements and inventory were made during the spring and summer of 1984.

At the same time that Hunter Douglas began scaling back operations, the Union, Local 404 of the United Electrical, Radio & Machine Workers of America, began organizing efforts. Between August and October 20 of 1984, the Union held four meetings of plant employees at the Union's offices. During this time, several union leaflets were distributed.

In August of 1984, Hunter Douglas notified retail customers that it would no longer accept orders from them after August 31, 1984 but would direct such orders to its network of fabricators. At that time, Hunter Douglas was operating two shifts with 63 employees on the first shift and 42 on the second shift.

Shortly after giving notice to its customers, Hunter Douglas' plan to cut back production at the Maywood plant was delayed by an unexpected development. J.C. Penney, one of Hunter Douglas' largest fabricators, was unable to satisfy the demand for Hunter Douglas products and asked Hunter Douglas to help fill its orders. Hunter Douglas agreed to produce window coverings for J.C. Penney at its Maywood plant. The arrival of J.C. Penney orders during the first week of September 1984 offset the drop in incoming orders that had resulted from its decision to refuse all retail orders received after August 31, 1984.

On October 18, 1984, Hunter Douglas learned that J.C. Penney intended to stop ordering products from Hunter Douglas. In response to the imminent loss of business,

Hunter Douglas decided to reduce manpower by eliminating the second shift, rather than spreading the layoff over both shifts, because of lower productivity on the second shift, greater management availability on the first shift, reduction in indirect costs, and security. This decision, which was consistent with lay-offs at other Hunter Douglas plants, resulted in the termination of thirty-six employees, including the second shift supervisor. After the layoff, no new employees were hired to replace those laid off or to replace other employees who left because of attrition. In June, 1986 the Maywood plant closed entirely.

On October 20, 1984, two days after Hunter Douglas learned of J.C. Penney's decision, the Union began distributing union authorization cards. By October 24, 1984, the day of the layoff, 73 authorization cards had been signed. No one in management, including the second shift supervisor who testified as General Counsel's witness, was aware that any authorization cards had been distributed.

On October 29, 1984, five days after the layoff, Hunter Douglas first received a demand for recognition from the Union. Prior to that time, the Union had not contacted Hunter Douglas management, had not appeared on company premises, and had not filed an election petition with the NLRB.

The Union subsequently filed three unfair labor practice charges against Hunter Douglas. Region 22 of the NLRB consolidated the charges and issued a Complaint against Hunter Douglas on December 20, 1984. The ALJ held seven days of evidentiary hearings concluding on March 8, 1985.

On March 4, 1985, while the case was pending before the ALJ, the Board filed a petition for injunctive relief with the United States District Court for the District of New Jersey, pursuant to Section 10(j) of the Act. 29 U.S.C. § 160(j). At the NLRB's request, the hearing on its application was delayed until the conclusion of the hearings before the ALJ. In the Section 10(j) proceeding, the NLRB relied solely and entirely upon the record established before the ALJ; no other evidence was presented. Based on this record (the same one that was ultimately before the Board and the Court of Appeals), the District Court found, *inter alia,* that there was no reasonable cause to believe that the elimination of the second shift had violated the Act. Accordingly, the Court denied the NLRB's request for injunctive relief on this issue. The Board did not appeal this ruling.

Subsequently, the ALJ found, *inter alia,* that Hunter Douglas had not violated the Act by eliminating the second shift. General Counsel filed exceptions and the case was thereafter decided by the Board without hearing. In its decision, issued on December 23, 1985, the Board overruled the ALJ and held that the elimination of the second shift was a violation of the Act. It ordered Hunter Douglas to reinstate or otherwise make whole the employees who had been laid off. App. G at 85a to 96a.

Hunter Douglas filed a Petition for Review of the Order of the NLRB with the Third Circuit on December 26, 1985. General Counsel thereafter cross-petitioned the Court of Appeals for enforcement of the Board's order.

In a two-to-one decision (Judge Weis dissenting), the Court of Appeals denied Hunter Douglas' Petition for Re-

view and granted General Counsel's request for enforcement of the Board's Order. The Court refused to consider the District Court's ruling in the Section 10(j) proceeding. App. A at 17a, n.1. It simply ruled that there was substantial evidence to support the Board's order. In dissent, Judge Weis argued that the Board had impermissibly shifted the burden of proof to Hunter Douglas, in violation of this Court's holding in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

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## REASONS FOR GRANTING THE WRIT

### POINT I

### The Decision By The District Court That No Reasonable Cause Existed To Support The Board's Allegation Precludes Relitigation Of That Issue.

This Court should grant certiorari to settle the important issue of whether the doctrines of issue preclusion pertain to a District Court's Section 10(j) determination where the NLRB's later decision on the merits is based on exactly the same record that was before the District Court.[2] The First Circuit, drawing on decisions from the Seventh, Eighth, and Tenth Circuits, has ruled that in appropriate circumstances a district court's finding of no reasonable cause in a Section 10(j) proceeding may be

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[2] We note preliminarily that this Court has never directly construed Section 10(j) of the Act, in spite of numerous requests for a definitive interpretation from lower courts. *E.g. Danielson v. Local 275, Laborers Int. U. of No. America*, 479 F.2d 1033, 1035 (2d Cir. 1973); *Kaynard v. Mego Corp.*, 484 F. Supp. 167, 173 (E.D.N.Y. 1980). The Court has only considered Section 10(j) twice. *See Amalgamated Clothing Workers of America v. Richmond Bros., Co.*, 348 U.S. 511 (1955) (Private parties may not bring action based on Section 10(j)); *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971) (Board sought injunction unrelated to unfair labor practice complaint). Neither of these cases involve the Board's application for a Section 10(j) injunction based on an unfair labor practice complaint.

given preclusive effect. *See Walsh v. International Longshoremen's Ass'n, AFL-CIO, Local 799*, 630 F.2d 864, 868 n.6 (1st Cir. 1980), citing *Madden v. Perry*, 264 F.2d 169 (7th Cir.), *cert. denied* 360 U.S. 931 (1959); *Cosentino v. Local 28*, 268 F.2d 648 (8th Cir. 1959); and *NLRB v. Acker Industries*, 460 F.2d 649 (10th Cir. 1972). The Fifth Circuit appears to favor this proposition as well. *See National Airlines, Inc. v. International Ass'n of M. & A. W.*, 430 F.2d 957, 960 (5th Cir.), *cert. denied*, 400 U.S. 992, (1970). In this case, however, the Third Circuit declined to afford the District Court's Section 10(j) determination any preclusive or even evidential effect, even though the NLRB's decision was based on the identical record before the District Court.

In a Section 10(j) proceeding, the Board need not prove its case by a preponderance of the evidence, as it must in an unfair labor practice proceeding. *See* 29 U.S.C. § 160(e). It must show only that there is reasonable cause to believe that an unfair labor practice has been committed. *E.g., Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984); *Silverman v. 40-41 Realty Associates, Inc.*, 668 F.2d 678, 680 (2d Cir. 1982); *Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622, 626 (8th Cir. 1977). The Board's burden in a Section 10(j) proceeding is "relatively insubstantial" and significantly below the "preponderance of the evidence" standard governing an administrative proceeding under Section 10(c). 29 U.S.C. § 160(e); *Kobell*, 731 F.2d at 1084. Indeed, it has been said that the Board's petition should be granted if the evidence favorable to it "lies within the range of rationality." *Hirsch v. Pick-Mt. Laurel Corp.*, 436 F. Supp. 1342, 1350 (D.N.J. 1977). *See also Squillacote v. Graphic Arts Int'l Union, AFL-CIO*, 540 F.2d 853, 858 (7th Cir. 1976), and case cited therein.

Ordinarily, the denial of a Section 10(j) injunction should not preclude further review on the merits by the Board because the Section 10(j) application is a preliminary application, usually based on an incomplete record. However, when the Board bases its application for an injunction on the full record which is before the ALJ, and subsequently before the Board, as was done here, the Board necessarily puts before the District Court the issue of whether there is reasonable cause to believe that an unfair labor practice has been committed. Given the policy considerations which underlie the issue preclusion doctrines, the Board should be bound by the District Court's decision that there is no reasonable cause to believe that Hunter Douglas violated the Act by eliminating the second shift. If there is no reasonable cause to believe that a violation occurred, *a fortiori* there can be no finding of a violation. The decision and findings of the District Court were law of the case because the District Court based its ruling upon the *exact same record* the Board relied on for its subsequent holdings. If the Board disagreed with the District Court's decision, the Board's remedy was to appeal that decision. Having failed to appeal, the NLRB is not free to ignore the District Court's ruling based on the same record.

The doctrines of issue preclusion reflect important public policies against the costly, vexatious, repetitious redetermination of identical issues. In particular, the law of the case doctrine is "based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, R & M Co.*, 339 U.S. 186, 198 (1949) *reh'g denied*, 339 U.S. 972 (1950). Likewise, the doctrine of collateral estoppel reflects a fundamental precept that a "right, question or fact distinctly put in issue and directly de-

termined by a court of competent jurisdiction . . . cannot be disputed in a subsequent [proceeding] between the same parties." *Montana v. United States,* 440 U.S. 147, 153 (1979). As this Court has observed:

> Application of [the issue preclusion] doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction . . . . [Citations omitted]. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

*Id.* at 153-54.

Issues may be re-examined only in limited circumstances, such as where a litigant presents substantially new evidence or controlling authority, *Commissioner v. Sunnen,* 333 U.S. 591, 599-601 (1947); *Otten v. Stonewall Insurance Co.,* 538 F.2d 210 (6th Cir. 1976); *United States v. Williams,* 728 F.2d 1402 (11th Cir. 1984), or where a decision is clearly erroneous and would lead to manifest injustice if left undisturbed. *Doe v. New York City Dep't of Social Services,* 709 F.2d 782 (2d Cir.), *cert. denied,* 464 U.S. 864 (1983). In the absence of one of these equitable considerations, courts will not reconsider issues that were previously decided either expressly or by necessary implication. *Daly v. Sprague,* 742 F.2d 896 (5th Cir.), *reh'g denied en banc,* 747 F.2d 1465 (1984). None of these equitable considerations are present here.

In the final analysis, issue preclusion constitutes an "expression of good sense." *Doe v. Arnig,* 728 F.2d 30

(1st Cir. 1984). Good sense dictates issue preclusion when the District Court makes its Section 10(j) determination on the same record developed before the ALJ.

In denying the Board's application, the District Court viewed the entire record in the light most favorable to the Board and expressly found that the evidence weighed heavily against that theory. App. D at 46a to 51a. Under analogous circumstances, the First Circuit noted the limited role of a district court but observed that it "does decide the limited issue of whether there is reasonable cause to believe that a violation has occurred so that injunctive relief is warranted." *Walsh*, 630 F.2d at 868-69. Accordingly, the Court concluded that issue preclusion was warranted as to that limited determination. The Court reasoned:

> Once the Board has been afforded this opportunity to have its petition heard and adjudicated in the district court and to appeal the denial of relief to the court of appeals, we see no reason to permit it to bring a second petition against the same respondent based on the same underlying charge. This type of repetition, which would be as expensive and vexatious to the respondent as any other type of litigation, is exactly what the rule of res judicata is designed to prevent.

*Id.* at 869.

Alleging that elimination of the second shift was caused by anti-union animus, the Board presented its argument to the District Court on the full record. Even with the benefit of the doubt, however, the Board failed to persuade the Court that there was even reasonable cause to believe its contentions. Clearly, the Board had a "full and fair

opportunity to litigate the narrow issue which [it] placed before the district court." *Walsh*, 630 F.2d at 869, *quoting Montana*, 440 U.S. at 154. The Board then proceeded as if the District Court's decision did not even exist. The Board's desire to relitigate established facts is manifestly inequitable and inefficient, and it warrants review by this Court.

## POINT II

### The Court Of Appeals Improperly Chose To Ignore And Refused To Consider The Record As A Whole.

The Court of Appeals may affirm a decision of the NLRB only if the Board's decision is supported by substantial credible evidence in the record below *considered as a whole*. *See* 29 U.S.C. § 160(f); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Section 10(f) of the Act, 29 U.S.C. § 160(f), requires the Court of Appeals to base its decision on the record as a whole. This requirement was specifically incorporated into the Act in 1947 to put an end to the then-prevalent practice among courts of appeals of looking only to particular pieces of evidence which supported the Board's decision and ignoring other evidence in the record which did not support the Board's decision. *See Universal Camera*, 340 U.S. at 485-488.

Contrary to the instruction of Congress in Section 10(f), the Court of Appeals in this case ignored and excluded from its consideration important portions of the record below. Specifically, the Court ignored the conclusion of the District Court on the Board's petition for Section 10(j) injunctive relief that there was no reasonable cause to believe that Hunter Douglas had violated the act by eliminating the second shift. App. A at 17a, n.1.

The findings and decision of the District Court on the Section 10(j) petition were part of the record below and should have been considered by the Court of Appeals. The Board filed the Section 10(j) petition as part of its overall prosecution efforts against Hunter Douglas. By so doing, the Board put before the District Court the issue of whether there was reasonable cause to believe Hunter Douglas had violated the Act. Both the ALJ and the Board considered the District Court's decision in reaching their respective decisions. The District Court's findings and decision were attached as exhibits to and referred to in Hunter Douglas' post-hearing brief to the ALJ. Similarly, the District Court's findings and decision were attached as exhibits to Hunter Douglas' brief in opposition to exceptions filed by General Counsel with the Board and were also referred to in the written argument to the Board. Thus, the decision of the District Court is properly part of the record in this case.

The Board certified the District Court's decision to the Court of Appeals as part of the Administrative record below. Pursuant to *Fed. R. App. P.* 17(b), the Board filed with the Court of Appeals a certified list of the documents constituting the record below. Included in this certified list was Hunter Douglas' "Brief in Opposition to Exceptions with Attachments", which included the decision and order of the District Court on the Section 10(j) Petition. Despite this inclusion, General Counsel later moved to strike these items from the joint appendix.

While the Court of Appeals did not expressly grant General Counsel's Motion, it specifically excluded the findings and decisions of the District Court from its consideration. App. A at 17a, n.1. By simply noting that

the Section 10(j) proceeding was not under review, the Court of Appeals apparently felt free to ignore the District Court's decision. The refusal of the Court of Appeals to consider a significant portion of the record contradicts the instruction of this Court and of Congress that the Court of Appeals' decision must be based on "the record considered as a whole". 29 U.S.C. § 160(f); *Universal Camera,* 340 U.S. at 488.

## POINT III

### The NLRB Erroneously Shifted The Burden Of Persuasion By Assuming General Counsel Had Established A Prima Facie Case And Failed To Apply The Correct Standard in Reviewing The ALJ's Credibility Determinations

The Board in this case improperly presumed the existence of a *prima facie* case. In essence, it held that the complaint against Hunter Douglas would stand because Hunter Douglas had failed to establish its affirmative defense that economic reasons motivated the elimination of the second shift. Contrary to this Court's directive in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and to the Board's own standards set forth in *Wright Line, A Div. of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enf'd sub nom. NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), the Board did not first find that anti-union animus was a substantial factor in causing the second shift layoff.[3] The Board also

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[3] The ALJ questioned whether General Counsel had made a *prima facie* case, but concluded such a finding was not necessary since Hunter Douglas had met its burden of showing that the layoffs were economically motivated. App. E at 71a to 72a.

failed to consider the ALJ's credibility findings under the heightened scrutiny test recognized in *Universal Camera Corp. v. NLRB,* 340 U.S. at 496. As demonstrated below, this Court should grant certiorari to clarify the requirements of a *prima facie* case and the effect of the ALJ's credibility determinations on the Board's subsequent proceedings.

### A. The Board Improperly Shifted The Burden Of Persuasion To Hunter Douglas Without The Prerequisite Showing By General Counsel Of A Prima Facie Case Against Hunter Douglas.

In a Section 8(a)(3) mixed motive discharge case, General Counsel has the initial burden of proving by a preponderance of the evidence that the employer had knowledge of union activity, that the employer had anti-union animus, and that the anti-union animus was a motivating factor in the discharge decision. 29 U.S.C. § 160(c). The employer does not have an obligation to prove a legitimate non-discriminatory reason for the discharge until General Counsel has met his initial burden. *See NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); *Wright Line, A Div. of Wright Line, Inc.,* 251 N.L.R.B. 1083 (1980), *enf'd sub nom NLRB v. Wright Line,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982).

General Counsel's initial burden is often referred to as a "*prima facie*" case. However, as Judge Weis correctly noted in his dissent, it differs markedly from the use of that term in other contexts. App. A at 21a to 23a. In a jury trial, for example, the plaintiff's evidence is assumed to be true for the purpose of determining whether plaintiff has established a *prima facie* case. In

the context of a mixed motive discharge case, however, General Counsel may not rely on an assumption of truth; he must *prove* the *prima facie* case by a preponderance of the evidence. See *NLRB v. Transportation Management*, 462 U.S. at 401. Then, and only then, does the burden of persuasion shift to the employer. *Id.*

Since the ALJ did not make a factual or legal finding that General Counsel had proved a *prima facie* case, the Board was required to make specific factual findings that General Counsel proved a *prima facie* case of discrimination in the decision to eliminate the second shift. The Board did not make such findings. The Board simply stated in its Amended Conclusions of Law that, "General Counsel made a *prima facie* case under § 8(a)(3) and (1) of the Act that union animus was a motivating factor in the Respondent's layoff of second shift employees . . .". App. G at 92a.

By offering no factual support for its determination, the Board skipped the essential threshold step of making a *factual finding* that General Counsel proved a *prima facie* case. Instead, it proceeded directly to require Hunter Douglas to prove that it would have eliminated the second shift even in the absence of union activity. In so doing, the Board disregarded the burdens of proof established in its own cases and by this Court. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); and *Wright Line*, 251 NLRB 1083 (1980).

Other circuits, in following *Transportation Management*, have required General Counsel to prove anti-union animus before proceeding to a discussion of the employer's affirmative defense. *See, e.g., NLRB v. Instrument Corp. of America*, 714 F.2d 324, 327-28 (4th Cir. 1983); *NLRB*

*v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1136-37 (7th Cir. 1983). The Third Circuit's willingness to tolerate the Board's premature shifting of the burden of proof in this case is at odds with *Transportation Management* and its progeny. Therefore, further review of the decision is warranted.

### B. The Court Of Appeals Should Have Applied A Strict Scrutiny Test In Reviewing The Board's Reversal Of Credibility Findings Made By The ALJ.

In determining that Hunter Douglas eliminated the second shift for legitimate non-discriminatory reasons, the ALJ necessarily determined that the witnesses and evidence presented by Hunter Douglas were more credible than the witnesses and evidence presented by General Counsel. Determinations of intent or motive largely depend on credibility findings. *Nelson v. Interior Board of Land Appeals*, 598 F.2d 531, 533 (9th Cir. 1979); *NLRB v. James Thompson & Co.*, 208 F.2d 743, 745 (2d Cir. 1953). When it overruled the ALJ's factual findings, the Board necessarily overruled the ALJ's credibility determinations. The Board's decision should therefore have been reviewed by the Court of Appeals under a stricter level of scrutiny. *See Universal Camera Corp. v. NLRB*, 340 U.S. at 496; *Eastern Engineering and Elevator Co., Inc. v. NLRB*, 637 F.2d 191, 197 (3d Cir. 1980); and *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544 (1950), *enf'd sub nom. Standard Dry Wall Products, Inc. v. NLRB*, 188 F.2d 302 (3d Cir. 1951).

The Board is not free to set credibility findings aside unless a clear preponderance of all the relevant evidence

demonstrates that those findings are erroneous. *See Nelson,* 598 F.2d at 533; *Standard Dry Wall Products, Inc.,* 91 N.L.R.B. at 545. The Board's decision, however, largely ignores numerous portions of the record.[4] By tolerating this, the Third Circuit departed from the approach of other circuits, as reflected in *Nelson,* 598 F.2d at 533, and *James Thompson,* 208 F.2d at 745.

The Third Circuit's decision in this case, if allowed to stand, will signal a new standard of appellate review under which enforcement will be granted so long as the Board can point to *some* evidence in the record supporting its decision. The decision's potential for mischief is considerable; indeed, it threatens an abrogation of *Universal Camera.*

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[4] As Judge Weis sets forth at length in his dissent, the Board discounted evidence that Hunter Douglas had already begun planning to reduce production at the Maywood plant, that the first shift employees who signed union authorization cards were not laid off, and ignored undisputed statistical and documentary evidence presented by Hunter Douglas. App. A at 24a to 28a.

—o—

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 26, 1987

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

———o———

NO. 85-3711

———o———

HUNTER DOUGLAS, INC.,

*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

———o———

On Petition for Review of
National Labor Relations Board
(NLRB Docket Nos. 22-CA-13511 and 22-CA-13588)

———o———

NO. 86-3010

———o———

HUNTER DOUGLAS, INC.,

*Respondent*

v.

NATIONAL LABOR RELATIONS BOARD,

*Petitioner*

———o———

On Cross-Application for Enforcement of an
Order of the National Labor Relations Board
(NLRB Board Docket Nos. 22-CA-13511
and 22-CA-13588)

———o———

Argued July 22, 1986

Before: GIBBONS, WEIS, and SLOVITER,
*Circuit Judges*

(Opinion filed November 6, 1986)

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## OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Before us is a petition for review by Hunter Douglas, Inc. from a decision and order of the National Labor Relations Board and a cross-application by the Board for enforcement of its order. The portion of the order contested by Hunter Douglas involves the Board's determination that Hunter Douglas' discharge of most of the second-shift employees at its Maywood, New Jersey plant violated sections 8(a)(1) and (3) of the Labor Management Relations Act (the "Act"), 29 U.S.C. §§ 158(a)(1), (3), and that Hunter Douglas' questioning of employee Victor Nunez violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

### I.

### *Facts*

Hunter Douglas manufactures window coverings and distributes both components for window coverings and window covering manufacturing equipment to fabricators and assembles the coverings itself. In the United States, it operates plants in Maywood, New Jersey; Dallas, Texas; Ontario, California; and Kent, Washington. The present case involves its actions at the Maywood plant.

During the summer of 1984 that plant operated on two shifts, with 63 employees on the first shift and 42 employees on the second. In August 1984, an employee informed Jose Lugo, the business agent of Local 404 of the United Electrical, Radio & Machine Workers of America, that Maywood employees were seeking to form a union. Subsequently, there were four meetings of plant employees at the union's offices. The first, on August 29, 1984, was attended by six

employees. Later meetings on September 15 and 29 and October 20 were (p. 4) attended by small but increasing numbers of employees. During this period, employees were also distributing union leaflets at the plant. At the fourth meeting, union authorization cards were distributed, and, by October 24, 1984, 73 signed authorization cards had been obtained, 36 from first-shift employees and 37 from second-shift employees.

In late August or early September 1984, John Santalla, the Maywood plant manager, received an anonymous letter mentioning the names of several employees who were trying to organize a union. Santalla then created employee committees, which he met with on September 18, 20 and 27 and October 5 and 17 in the plant cafeteria on working time. At the meetings, employees complained of working conditions, such as problems with the heating system, air conditioning, bathrooms, and cafeteria. Santalla said he would try to resolve these problems. The employees also mentioned the possibility of receiving more pay. Santalla replied that the company was trying to initiate an incentive pay plan. Medical insurance was also discussed. At the third meeting, Santalla asked each of the employees whether their previous employer had had a union, to which some responded that it had and others that it had not. At the fourth meeting, Santalla distributed a list of proposed shop rules for the committee's consideration. One of the rules prohibited solicitation of employees if either the soliciting or the solicited employee was on working time. Another of the rules prohibited distribution of handbills and literature in plant working areas.

In October 1984, Santalla asked a machine operator, Victor Nunez, who went to Santalla's office to get a band-

aid, whether it was true that Nunez wanted to join the union. Nunez replied "John, you know that I promised you that I do not want to know anything about unions, and I am not going to join any unions." (p. 5) App. at 683. Santalla then told Nunez no one else was to know about the conversation. A second conversation occurred in the area of the restrooms. Santalla said that he wanted to ask Nunez a confidential question and inquired whether it was true that the employees "were trying to get the Union back in place." App. at 684. Nunez replied, "I promised you that I wasn't going to get into a union, and I don't want to talk about it anymore." App. at 684.

On October 24, 1984, Hunter Douglas discharged 35 of the 42 second-shift employees and the second-shift supervisor. It is the General Counsel's position that the company's motive in discharging the second-shift employees was to inhibit union activity.

Hunter Douglas, on the other hand, argues that these firings resulted from legitimate business reasons stemming from its strategy to cease all work for retail customers. Even before the events at issue, Hunter Douglas had sold its products primarily through independent fabricators. For approximately 90 percent of its window coverings, Hunter Douglas would produce the components but then distribute them to its network of fifty to sixty fabricators who were responsible for assembly and retail sales. In the spring and summer of 1984, Hunter Douglas decided to direct all orders through its fabricator network. In August 1984, it advised retail customers that after August 31, 1984 all orders should be directed to its fabricators.

Hunter Douglas claims that it realized this strategy would give it excess production capacity, and that in spring

1984 it began to plan ways to reduce that capacity. Between March and July 1984, it reduced management personnel by 50%. It made similar cuts in space requirements and inventory during summer and fall 1984. Hunter Douglas claims that it would have had reduced manufacturing manpower needs at the Maywood plant in early September 1984, but that it (p. 6) was able to stave off a long-planned reduction in manufacturing workers at the Maywood plant because of orders from J.C. Penney, one of its largest fabricators. Penney had oversold its capacity and sought production assistance from Hunter Douglas the first week in September.

On October 18, 1984, O. B. Kelley, Hunter Douglas' Vice President of Sales and Marketing, learned that Penney would place no more orders with Hunter Douglas. Kelley informed George Shouldis, Vice President and General Manager of Hunter Douglas. On October 23, 1984, the loss of the Penney orders was confirmed. That same day Shouldis instructed John Brown, Director of Manufacturing, to develop a plan to reduce manpower. That same day, Brown, after consultation with Santalla, recommended to Shouldis that the second shift be eliminated. On the next day, October 24, 1984, with no notice, 35 of the Maywood plant's 42 second-shift employees and the second-shift supervisor, Jose Algarin, were informed of their discharge. Hunter Douglas explains that the dismissal without notice was effected to spare its employees from feelings of "unrest" and "discomfort". App. at 795. Local 404 formally demanded recognition from Hunter Douglas on October 29, 1984.

## II.

### *Proceedings*

Local 404 filed three unfair labor practice charges against Hunter Douglas, which were consolidated in a complaint issued by the Regional Director. Following a hearing, the Administrative Law Judge found, *inter alia*: that Hunter Douglas had violated sections 8(a)(1) and (2) of the Act by establishing committees, soliciting grievances, granting benefits and promulgating prohibitions on solicitation and (p. 7) distribution, all as a means of discouraging union organization; and that there was not sufficient evidence to show that Algarin, the second-shift supervisor, had been discharged for his refusal to commit unfair labor practices.

With respect to the activities at issue here, the ALJ dismissed the allegation that elimination of the second shift was an unfair labor practice. The ALJ found: "Respondent [Hunter Douglas] had knowledge of the Union's activities, Santalla displayed animus towards the Union and the timing of the discharges was such that they occurred during the Union campaign." App. at 40. He stated that although 90% of the second-shift employees had signed authorization cards, the discharges occurred before Hunter Douglas was aware of the signing of the cards and before Local 404 demanded recognition. The ALJ stated it was "questionable", but did not decide whether the General Counsel made a *prima facie* showing that protected conduct was a motivating factor in the decision to eliminate the second shift. App. at 40. He found no violation had occurred because he concluded that Hunter Douglas would

have eliminated the second shift even in the absence of the protected conduct.

The ALJ also concluded that the questioning of Victor Nunez about union activities was not coercive under the totality of the circumstances and therefore was not an unfair labor practice. Noting that Nunez was not summoned to Santalla's office on the first occasion and that the two met casually near the restrooms on the second occasion, the ALJ found that Santalla's inquiries were the kind of "casual questioning concerning union sympathies" permitted by the Act. App. at 39 (quoting *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983)).

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(p. 8) Only the General Counsel filed exceptions to the ALJ's decision. The Board affirmed the ALJ's rulings, findings, and exclusions except with respect to the discharge of the second shift and the interrogation of Nunez. Hunter Douglas, 277 NLRB No. 123, slip op. at 7 (Dec. 23, 1985). The Board held that the ALJ's analysis of the discharge of the second shift was faulty because it failed "to consider record evidence that demonstrates that the second shift was selected for layoff in order to defeat the union campaign." *Id.* at 3. Drawing different inferences from the facts on record, the Board concluded that the General Counsel made a prima facie case that union animus was a motivating factor in the layoff of second-shift employees, and that Hunter Douglas failed to show by a preponderance of the evidence that those employees would have been laid off in the absence of union activity and animus. *Id.* at 7. It thus held that the discharge of its second-shift employees violated sections 8(a)(1) and (3) of the Act.

The Board also rejected the ALJ's conclusion that Santalla's questioning of Nunez was not coercive. The Board stressed that Santalla told Nunez the inquiries were confidential, that the questions had no legitimate purpose, and that Santalla was a plant manager who had conducted the interrogation in a calculated fashion. *Id.* at 6-7. The Board, therefore, held that Santalla's questioning of Victor Nunez on two occasions violated Section 8(a)(1) of the Act because it tended to interfere with the exercise of employees' protected rights. *Id.* at 7.

## III.

### *Standard of Review*

We must sustain the Board's findings of unfair labor practices if they are supported by substantial evidence on the record considered as a whole. (p. 9) *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 487-91 (1951); *Graham Architectural Products Corp. v. NLRB,* 697 F.2d 534, 537 (3d Cir. 1983). Similar deference is granted the Board's inferences from facts which, if supported by substantial evidence, may not be displaced even though this court acting *de novo* might have reached a different conclusion. *Universal Camera,* 340 U.S. at 488; *Herman Brothers, Inc. v. NLRB,* 658 F.2d 201, 209 (3d Cir. 1981); *NLRB v. Garry Manufacturing Co.,* 630 F.2d 934, 937 (3d Cir. 1980).

Here, the Board disagreed with the ALJ. Hunter Douglas contends that this should subject the Board's findings to stricter scrutiny by this court. *See Eastern Engineering & Elevator Co. v. NLRB,* 637 F.2d 191, 197 (3d Cir. 1980). *See also Albritton Communicatons Co. v. NLRB,* 766 F.2d 812, 817 (3d Cir. 1985), *cert. denied,* 106

S. Ct. 850 (1986) ("When, as here, the Board rejects certain findings made by an ALJ, this 'substantial evidence' standard is cast in a special light"). The Board, on the other hand, argues that when the differences between the Board and the ALJ stem solely from different inferences from the overall record evidence, we are to attach no special weight to the ALJ's contrary conclusions, since it is the Board's decision that is under review. *See Stein Seal Co. v. NLRB*, 605 F.2d 703, 706 (3d Cir. 1979); *NLRB v. Duquesne Electric & Manufacturing Co.*, 518 F.2d 701, 704-05 (3d Cir. 1975).

This issue was discussed in our in banc decision in *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980), *cert. denied*, 450 U.S. 996 (1981), where we stated:

> [T]he Board is not in any way inhibited by inferences drawn by the ALJ. To the contrary, the authority to draw legitimate inferences from proven facts is exclusively the Board's not the (p. 10) ALJ's or the court on review of the Board's order. Indeed, we have consistently held that "the Board has the power to draw different conclusions from evidentiary facts" presented to the ALJ, including conclusions that directly contradict those reached by the ALJ. (citations omitted). If more than one inference may be drawn from a given set of facts, therefore, the conclusion of the Board will control unless it is unreasonable.

*Id.* at 316.

In this case, the Board did not make credibility findings that differed from the ALJ. Instead, the Board exercised its authority to draw "legitimate inferences from proven facts." We must therefore review its findings under the generally applicable substantial evidence standard.

*See Garrett Railroad Car & Equipment, Inc. v. NLRB*, 683 F.2d 731, 739-40 (3d Cir. 1982).

## IV.

### *Discharge of the Second-Shift Employees*

### A. *Prima Facie Case*

In determining whether a discharge of employees constitute an unfair labor practice under sections 8(a)(1) and (3) of the Act, the General Counsel bears the initial burden of making a *prima facie* showing by a preponderance of the evidence that protected conduct was a motivating factor in the employer's conduct. Once the General Counsel demonstrates a *prima facie* case, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct by the employees. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 610 (3d Cir. 1984); *Wright Line, a Division of* (p. 11) *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

Although the ALJ made no specific finding whether a *prima facie* case had been made out, the Board explicitly stated as a conclusion of law that the General Counsel had established a *prima facie* case. Hunter Douglas argues that there is no substantial evidence to support this conclusion. In essence, its argument is that a *prima facie* case depends on a showing that the discharge of the second-shift employees was motivated by antiunion animus. It argues that such a showing was not made because there was no evidence that Shouldis or Brown, the two company

officers responsible for the elimination decision, had any knowledge of union activity or harbored antiunion animus towards that activity. Hunter Douglas points to the fact that the first demand for recognition by Local 404 did not occur until October 29, 1984, five days after the second shift's elimination, and it claims that until that demand, union activity was so minimal as to be unnoticeable.

Concededly, attendance at union meetings held prior to the second shift's elimination was not large. The testimony was that six workers attended the first meeting, somewhat more attended the next two meetings, and 11 attended the fourth meeting. Meetings were not, however, the sole extent of union activity. Union literature in both English and Spanish, including 200 leaflets, was distributed in and around the plant in September and October. On October 20, the distribution of union authorization cards began. By October 24, approximately 50% of the workers on the first and second shifts had signed and returned authorization cards.

Hunter Douglas does not contend that plant manager Santalla was unaware of the union activity. (p. 12) His keen interest in that activity, as well as his antiunion animus, is fully substantiated on the record. In September, Santalla questioned second-shift supervisor Algarin about possible union activity by an employee. In September and October, Santalla organized and participated in the employee committee meetings at which the no-solicitation and no-distribution rules which would have precluded union literature were promulgated. After one meeting, Santalla questioned Algarin about an employee who had complained about low pay and Santalla told Algarin, "I don't care

what you do, get rid of her. If anybody has anything to do with the Union, she's one of them," App. at 521: *see also* App. at 957-58. Santalla questioned employee Nunez about his union activity twice in October. Most significantly, in October, Santalla instructed Algarin to watch for union activists in the second shift as Santalla wanted to "get the teeth out of the union." App. at 528.

Hunter Douglas points to direct testimony by Brown and Shouldis that they had no knowledge of union activity. However, Brown also testified that he was always "aware there was a potential for union activity. And from time to time I heard comments, but nothing that I could recall specifically." App. at 860. The ALJ did not find that Brown and Shouldis had no knowledge of union activity. He did find, without further elaboration, that "Respondent [Hunter Douglas] had knowledge of the Union's activities." App. at 40.

It is significant that when Shouldis asked Brown on October 23 to formulate a personnel reduction plan, Brown then consulted with Santalla, who was well aware of the increasing union activity. Santalla admitted in his testimony that he recommended to Brown that the second shift be eliminated. App. at 976. Brown in turn relied on Santalla's recommendation in (p. 13) suggesting the second shift's elimination to Shouldis. App. at 878. Where, as here, a supervisory employee has knowledge of union activity, an inference that he has communicated that knowledge to his superiors is permissible. *See Texas Aluminum Co. v. NLRB,* 435 F.2d 917, 919 (5th Cir. 1970).

In some cases, the courts have upheld the Board's inferences of knowledge of union activity solely on the basis

of the timing and nature of the discharge despite company claims that no management officials were aware of union activity. *See NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 117 (8th Cir. 1973); *NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295-96 (2d Cir. 1972); *NLRB v. Sequoyah Mills, Inc.*, 409 F.2d 606, 609 (10th Cir. 1969). In this case as well, a similar inference is permissible, not only from the plant manager's knowledge but from the timing and nature of the discharge.

The company's abruptness in implementing Brown's recommendation is significant. Employees were given no notice of their discharge and were simply informed when they arrived at work on October 24 that they no longer had jobs. This abrupt discharge coincided with the culmination of Local 404's drive to obtain union authorization cards. The only explanation offered for the lack of any notice prior to discharge, Shouldis' testimony that, "I think decisions as dramatic as this require immediate mplementaton. I think to drag along only causes unrest and discomfort for all concerned." App. at 795, is implausible.

Moreover, the manner of implementing the abrupt layoff departed from the company's past practice of reassigning employees to other shifts. When Hunter Douglas eliminated its third shift in 1983, it used the opportunity to "weed out some of the deficien[t]" employees, by reassigning others to the first two shifts. (p. 14) App. at 797. In 1984, a layoff was spread through the first and second shifts, using the same weeding out procedure. App. at 796-97. Although Hunter Douglas retained some second-shift employees with special skills, it has never suggested that it employed the same type of weeding out process that

it had previously employed, and instead discharged almost all of the 42 second-shift employees in one fell move. The company cannot rationalize its action at the Maywood plant by its subsequent decisions to eliminate the second shift at the Kent, Washington plant in October 1984 and at the Ontario, California plant in January 1985.

Hunter Douglas contends that other evidence dispels any inference of discriminatory motive in the second-shift's elimination. It argues that because almost equal numbers of union cards were obtained from each shift, 36 from the first shift and 37 from the second shift, both shifts had relatively equal amounts of union activity. By looking only at the numbers, Hunter Douglas ignores the relevant percentages. Because the first shift had 63 employees while the second shift had only 42, only 56% of the first shift but over 90% of the second shift signed union cards. Moreover, the second-shift employees were more active in engaging in union activity. All six employees who attended the initial union meeting were from the second shift as were a majority of attendees at each of the subsequent meetings. Second-shift employees were primarily involved in the distribution of literature and union cards. Most important, Santalla's activities were concentrated on the second shift. Second-shift supervisor Algarin testified that Santalla said "that he was aware that some of the employees were trying to organize a union and that he believed that it was coming from [the second] shift." App. at 527.

(p. 15) Hunter Douglas also emphasizes that it retained ten union supporters from the second shift. Even if true, this does not change the fact that the majority of the

second shift, which was the focus of union activity, *was* laid off. Moreover, courts have held that it is "irrelevant that some union sympathizers were not laid off, when the layoffs were meant to chill union activity," *NLRB v. RainWare, Inc.*, 732 F.2d 1349, 1355 (7th Cir. 1984). *See also Birch Run Welding & Fabricating, Inc. v. NLRB*, 761 F.2d 1175 (6th Cir. 1985).

We have previously stated that "because there often is no direct evidence of antiunion motivation, the Board may rely on circumstantial evidence to prove such intent." *NLRB v. Scott Printing Corp.*, 612 F.2d 783, 787 (3d Cir. 1979). *See also NLRB v. Treasure Lake, Inc.*, 453 F.2d 202, 205 (3d Cir. 1971). In this case, there was sufficient circumstantial evidence to support the reasonable inferences made by the Board. Even if Brown and Shouldis were not personally aware of the concentrated union activity that had taken place in the plant in the two months before elimination of the shift, since Santalla had both knowledge of that activity and antiunion animus and his recommendation played a part in the ultimate decision, Hunter Douglas may be held to have acted out of antiunion animus. Otherwise, companies will be able to accomplish impermissibly motivated discharges without penalty through the simple expediency of dividing their personnel functions and insulating top management from common knowledge. *See Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962). Accordingly, we hold that there was substantial evidence to support the

Board's conclusion (p. 16) that the General Counsel had made out a *prima facie* case.[1]

B. *The Company's Articulated Business Reason*

Hunter Douglas also argues that even if the General Counsel established a *prima facie* case, the ALJ correctly found that Hunter Douglas proved that the discharge of the second shift would have occurred even in the absence of any union organizing conduct. The company bases this claim on evidence of its overall policy of work reduction and reorganization, the unexpected termination of orders by J.C. Penney, and its "sharply" reduced production needs after the layoff.

The Board did not reject Hunter Douglas' position that some form of work reduction would have occurred because of the change in its marketing strategy. It concluded, however, that Hunter Douglas failed to sustain its burden of proving that the timing and nature of the reduction that did occur resulted from business reasons, as it claimed, rather than from an attempt to discourage

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1. Hunter Douglas refers us to the findings of the district court of the District of New Jersey on the Regional Director's petition for injunctive relief under section 10(j) of the Act. 29 U.S.C. § 160(j), as support for its claim that no substantial evidence supports the Board's findings. The district court granted partial injunctive relief, but also held that there was not reasonable cause to believe that the elimination of the second shift violated the Act. The court did not believe that all the discharges complained of were the product of [Hunter Douglas'] anti-union animus" and was "satisfied that [Hunter Douglas'] evidence on its defense of economic necessity overcomes the presumption in favor of injunction." App. at 101. The 10(j) proceeding is not under review, and hence cannot affect our determination. Because we do not rely on those materials, it is unnecessary to address the Board's motion to strike them from the appendix.

unionization. *See Transportation Management*, 462 U.S. at 400-03.

(p. 17) In reaching this conclusion, the Board relied on the "abruptness of the layoff, coming as it did at the time of the union drive," and the fact that "this layoff deviated from previous layoffs, in that it involved elimination of an entire shift rather than a reduction in the number of overall employees based on individual considerations." *Hunter Douglas*, 277 NLRB No. 123, slip op. at 5-6.

The mass of economic data that the company lays before us does not convince us that there is not substantial evidence to support the Board's decision. Hunter Douglas claims it had sharply reduced production needs, but in fact it took some time for production to decrease. The company's average incoming orders for the first three weeks of November were substantially equivalent to the company's average in October. Although the number of orders then declined for the two weeks near the Thanksgiving holiday, in December they returned to their approximate October level. App. at 290-91. The plant continued to be busy after the layoff, and the remaining first-shift workers were given the opportunity of working overtime "[j]ust about every day" until two to three weeks before Christmas. App. at 636-37. This tends to refute Hunter Douglas' argument that the loss of J. C. Penney orders required immediate reduction of the workforce. In fact, in its opinion the Board noted that Shouldis testified that Penney's termination of orders "was not a loss" because Hunter Douglas did not rely on Penney's unsolicited business, and that Brown testified that the layoff was not "precipitated by any one event." *Hunter Douglas*, 27 NLRB No. 123, slip op. at 4; *see also* App. at 821, 847-48.

The Board was not obliged to credit Hunter Douglas' contention that lower productivity on the second shift was the cause of its elimination, (p. 18) particularly in light of the layoff of workers who had been commended by Santalla for their productivity and one worker who had participated in training of third-shift employees. App. at 454, 501-02. Based on the record that had been adduced before the ALJ, and without overturning any of his credibility determinations, the Board concluded that "the layoff of second-shift employees would not have happened as it did were it not for the desire of the Respondent to impede union activity." *Hunter Douglas,* 27 NLRB No. 123, slip op. at 6. There was substantial evidence to support that determination.

## V.

### *Interrogation of Nunez*

Hunter Douglas also challenges the Board's determination that Santalla's interrogation of employee Victor Nunez tended to interfere with the exercise of employees' protected rights and therefore was in violation of Section 8(a)(1) of the Act. In *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, this court stated:

> An employer's questioning becomes coercive and runs afoul of section 8(a)(1) when it "suggests to the employees that the employer may take action against them because of their pro-Union sympathies. . . ." Although the Board need not show that the employer's interrogation actually had any coercive effect, the questioning must reasonably have tended to coerce under the circumstances.

*Id.* at 537 (quoting *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 65 (3d Cir. 1978)). *See also NLRB v. Keystone Pretzel*

*Bakery, Inc.*, 696 F.2d 257, 259-260 (3d Cir. 1982) (in banc); *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314.

(p. 19) Here, Santalla, questioned Nunez during the first week of October when Nunez had gone to Santalla's office to get a band-aid. Nunez testified that Santalla

> wanted to know if it was true that I wanted to get into the Union again. I said, "John, you know that I promised you that I do not want to know anything about unions, and I am not going to join any unions. He said . . . that matter was something between he and I, and that one else was to know about it.

App. at 683. Although Hunter Douglas argues that this was the kind of "casual questioning concerning union sympathies" which is permissible under the Act, *see Graham Architectural Products*, 697 F.2d at 541, the Board noted Santalla's direction that the conversation be kept confidential, which suggests to us that the questioning was more than "casual". Although Nunez' answer implies a promise made and no need to discuss the matter again. Santalla did question Nunez again, this time near the restrooms. Nunez testified that Santalla:

> told me that he wanted to [ask] a confidential question of me. That he wanted to know if it was true that we were trying to get the Union back in the place. I told him—I promised him—"I promised you that I wasn't going to get into a union, and I don't want to talk about it anymore."

App. at 684.

Such repeated confidential questioning was unlikely to be taken as "casual" by the employee. As the Board pointed out, Santalla had no legitimate purpose for the questions. We find substantial evidence to support the

Board's findings regarding the interrogation in the nature of the questions, their repetition, their lack of any legitimate purpose, (p. 20) Santalla's high management position, and his emphasis on their confidentiality.

## VI.

### *Conclusion*

Hunter Douglas does not oppose the Board's request for enforcement of the portion of its order based on its findings that the company violated Sections 8(a)(1) and (2) of the Act by forming employee committees and convening meetings of the committees to solicit and resolve grievances, and that the company violated Section 8(a)(1) by granting benefits, remedying grievances, and promulgating a no-solicitation and no-distribution rule. Because we have found that substantial evidence supports the Board's other findings, we will enforce the entire order of the Board and deny Hunter Douglas' petition for review.

WEIS, *Circuit Judge,* dissenting.

The decision of the Board in this case illustrates the importance of the burden of proof to the resolution of a controversy. The Board's opinion also demonstrates a curious ambivalence in assessing the evidence required of the parties to meet their respective burdens.

Review of the record here must be more searching than in the usual case where the Board and the ALJ agree on their findings. Although the "substantial evidence" test applies in both instances, that "standard is cast in a special light" when "the Board rejects certain findings

made by an ALJ." *Allbritton Communications Co. v. NLRB,* 766 F.2d 812, 817 (3rd Cir. 1985). The evidence supporting a determination (p. 21) may be less substantial when an ALJ "who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951). *See also Eastern Engineering & Elevator Co., Inc. v. NLRB,* 637 F.2d 191, 197 (3d Cir. 1980).

This caution is particularly applicable when the narrative facts found by the ALJ are grounded on evalutions of oral testimony. As the Board explained in *Standard Dry Wall Products, Inc.,* 91 N.L.R.B. 544, 545 (1950), the ALJ's findings based on credibility will not be disturbed unless a "clear preponderance of *all* the relevant evidence" demonstrates error. In my judgment, it is unrealistic to assume that an ALJ's choice of inferences from narrative facts is not similarly affected to a substantial degree by credibility judgments made in the course of hearing testimony.

In this case, the Board concluded that General Counsel had met the burden of establishing a prima facie case, although the ALJ had been extremely dubious on that point. The ALJ did determine that Hunter Douglas had met its burden of proving an economic reason for the layoff. The Board however found to the contrary despite largely undisputed evidence, significant portions of which were statistical and documentary.

In mixed motive discharge cases, General Counsel must establish by a preponderance of the evidence that the employee's protected conduct "was a substantial or

a motivating factor in the discharge." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983). Although the General Counsel's burden has been labeled a "prima facie" case, this use of the term should be distinguished from its application in other contexts.

(p. 22) In a jury trial, the plaintiff makes out a prima facie case if, assuming the truth of his evidence, a claim has been established. In a Board hearing, however, the assumption of truth criterion plays no part in the evaluation of General Counsel's "prima facie" case. Only if he meets the burden of presenting truthful evidence that supports his position by a preponderance has he made out his case. Thus, if the ALJ finds that the testimony produced by the General Counsel is not worthy of belief, a prima facie case has not been established, even if that evidence would have been committed to the fact finder in a jury case.

If General Counsel successfully meets his burden of persuasion, the employer nevertheless is not liable if it proves that the discharge would have occurred in any event. Rephrased, despite the fact that an employee's protected conduct was a substantial or motivating factor in his discharge, the employer is not subject to reinstatement or back pay orders if it can prove that the discharge would have occurred regardless of the forbidden motivation. The employer bears the burden of proving this affirmative defense. *NLRB v. Transportation Management Corp.*, 462 U.S. at 401.

In the case at hand, the Board found that General Counsel had met his burden based on inferences it drew from the testimony. These included the fact that Santalla, the plant manager, knew that union organizing efforts were

underway on the second shift. Moreover, the company deviated from its previous practice of considering individual seniority or qualifications in spreading the layoffs between shifts. The Board also found it "not credible" that Shouldis and Brown, the company officers, would accept Santalla's recommendation and act "with such great haste."

The Board's emphasis on the abruptness of the layoff fails to consider that a reduction in force had (p. 23) been contemplated for some time and that other steps had already been taken to change the character of the operation at the Maywood Plant.

Substantial evidence indicates that the company was aware of the interest of some employees in joining a union. Although the employer did decide to lay off the second shift, it followed its previous practice to the extent of retaining ten employees because of their special skills. Significantly, these employees were union adherents, but the Board failed to mention this fact or to note that none of those on the first shift who signed union authorization cards were discharged.

Of the total who had signed union cards, thirty-six employees were from the first shift and thirty-seven were from the second. That a larger percentage of the second shift had signed cards is of no importance. Representation elections are determined by absolute numbers, not percentages.

In short, the Board strained mightly to find that General Counsel had met his burden. Yet, it was curiously reluctant to credit undisputed facts which the company of-

fered to prove that the employees would have been discharged in any event.

The company relied on a number of factors:

1. Lower productivity of the second shift compared with the first was documented in statistical evidence showing that the gap was widening in the period from August through October 1984. In addition, Jose Algarin, the supervisor for the second shift who was also discharged, conceded that he had received complaints from Santalla about productivity. The ALJ observed that Algarin "appeared to me to be a credible witness." (p. 24)

2. Larger management representation was available during the first shift. The record reflects that the first shift hours were 7:00 a.m. to 3:30 p.m. (App. at 144), when management personnel would be expected to be present in greater numbers than in the later hours of the second shift.

3. Security considerations were expected to be less during the daylight hours of the first shift.

4. Indirect costs would be reduced, for example electricity used to light the work stations and run the equipment would not be required for the second shift hours.

The Board listed these factors but dismissed them, arguing that they failed to explain why the company had deviated from its previous practice of considering individual seniority and qualifications. As noted earlier, the Board overlooked the fact that some employees had been retained because of special qualifications. Furthermore, the Board ignored the evidence that since becoming director of manufacturing in May, 1984, Brown met the need for workforce reductions at three of the employer's plants by eliminating a shift.

By failing to answer these specific points, the Board seems to concede, implicitly at least, that the company had articulated adequate reasons for laying off some employees, if not particularly those on the second shift. The record compels that conclusion.

Undisputed evidence shows that early in 1984 the company had decided to expand its policy of using a network of independent fabricators to assemble blinds. Substantial reductions in management personnel, inventory, and amount of floor space had already taken place before August, when the company announced (p. 25) that further referrals of work to fabricators would be made. That decision made reductions in the number of employees inevitable.

The record demonstrates, again without contradiction, that in August, Shouldis and Brown discussed the necessity of reducing the work force. No employees were discharged then because the J.C. Penney business unexpectedly arrived at the point when the company otherwise would have implemented the cutback.

The records of Hunter Douglas's operations in the months following the October discharges amply demonstrate that economic pressures were the actual motivation for the reduction in manpower. Although J.C. Penney sent in a few more orders after October 24, the volume of other new orders continued to decline. The company has not recalled any of the employees who were discharged in October, nor has it hired new employees to replace those lost by normal attrition.

Furthermore, Hunter Douglas did not find an increase necessary in its overtime assignments after the October

discharges. In August overtime expenses were $5,280. That sum increased in September to $11,521 when the J.C. Penney orders came in, and it fell to $5,550 in October. In the first month after the October discharges, the overtime dropped to $2,199, rose to $5,807 in December, and declined to $103 in January.

In the face of this uncontroverted data, it is difficult to understand how the same Board that piled inference on inference drawn from largely circumstantial evidence to find that General Counsel had met its burden, could then conclude that the company's factual data did not satisfy the burden of establishing an independent business justification for the reduction in force.

(p. 26) Like the ALJ, I am skeptical that General Counsel presented a prima facie case. Accepting *arguendo* the Board's determination that the burden had been met, however, I am persuaded that application of the same test to the employer's claim cannot but result in a conclusion that it was the much stronger of the two.

The weakness of the Board's decision is perhaps most evident when an attempt is made to ferret out just what the Board thinks the employer should have done to meet its burden of proof. There is some indication, although not clearly stated, that the company should have followed its previous practice in laying off those with less qualifications and seniority. The Board, however, cites no authority for freezing a company's procedures when legitimate business conditions justify a change. To the contrary, in *Hardwick Co., Inc.*, 263 NLRB No. 47 (1982), the Board refused to find a violation of the Act where the employer, during an organizing campaign, changed its method

of selecting employees for layoff from a subjective merit system to a purely seniority-based one.

Moreover, I suspect that if that previous practice had been followed, more union adherents would have been laid off than was the case here. In that event, the Board might well have complained that a more neutral method—perhaps laying off an entire shift without individual discrimination —would have been a permissible way of effecting the necessary reduction in force. One also wonders whether the Board would not be forced by its logic to say that choosing the first shift instead of the second likewise would have been a violation of the Act.

The Board also placed some significance on the timing, implying perhaps that even though a reduction in force was to be expected, it should not have come so soon. Even if the layoff could have been postponed for possibly a month, based on orders received, the Board (p. 27) did not limit its relief to that period of time. Reinstatement and back pay awards result in the employer being required to pay for two full shifts during a period in which, by no stretch of the imagination, would it have employed a work force of that size.

In short, I conclude that the record does not contain substantial evidence to support the Board's rejection of the employer's affirmative defense,[1] and accordingly I would deny enforcement of the reinstatement order.

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1. Based on the same record as that before the Board, the district court concluded that the employer had overcome the presumption in favor of a § 10(j) injunction by establishing the defense of economic necessity. The court rejected the Board's contention that there was "reasonable cause" to believe the discharges were caused by anti-union animus.

Many of the same observations apply to the charge that Santalla's conversations coerced Nunez. We described the legal standards applicable to a claim of this nature in *Graham Architectural Products Corp. v. NLRB,* 697 F.2d 534, 537 (3d Cir. 1983). We noted that, as here, the ALJ was in a better position than the Board to determine the character of the interrogation. Adopting a pragmatic view of the workplace, we observed that supervisors and employees often work closely together and that during the course of the day they may discuss many subjects including unionization efforts. "To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace." *Id.* at 541.

To make out a violation, General Counsel must establish the necessary element of a tendency to intimidate or coerce. When interrogation occurs under casual circumstances and conveys no direct or implied threat or warning to the employee, the employer's right (p. 28) "to communicate with their employees concerning an ongoing union organizing campaign" comes within the scope of the First Amendment. *Id.* at 541.

I recognize that the test is objective—whether the interrogation "tends" to restrain or coerce rather than actually produces that result, *Frito Lay, Inc. v. NLRB,* 585 F.2d 62, 65 (3d Cir. 1978). Nevertheless, it is interesting that at the time Santalla questioned Nunez, he apparently had not joined the union effort. He, however, later signed an authorization card on October 23, 1984. (App. at 212).

The ALJ had the opportunity to hear testimony from both Nunez and Santalla, and was thus in a far better posi-

tion to appraise the effects of the interrogation than the Board. Judgments based on demeanor are particularly important in questions of this nature. The Board failed to provide any satisfactory reason for its refusal to accept the ALJ's findings that the questioning had not been coercive.

In sum, substantial evidence does not support the Board's decision on the coercion issue. The determination not only is contrary to our holding in *Graham Metals,* but also is inconsistent with the Board's own opinion in *Rossmore House and Hotel Employees and Restaurant Employees Union,* 269 NLRB No. 198 (1984). I would deny enforcement of this order as well.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

## APPENDIX B

UNITED STATES OF AMERICA
FOR THE DISTRICT OF NEW JERSEY

ARTHUR EISENBERG, Regional Director
of the Twenty-second Region of the
National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner

v. Civil No. 85-1066

HUNTER DOUGLAS, INC.,

Respondent

ORDER TO SHOW CAUSE

The Petition of Arthur Eisenberg, Regional Director of the Twenty-second Region of the National Labor Relations Board, herein called the Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 160(j), herein called the Act, praying for issuance of an order directing Respondent, Hunter Douglas, Inc., to show cause why an injunction should not issue enjoining and restraining Respondent from engaging in certain acts and conduct in violation of the Act, pending the final disposition of the matters involved pending before the Board, and to show cause why the District Court should not utilize the transcript of the Board's Administrative proceeding, as the record before the District Court without need of any further evidentiary hearings before the District Court; and good cause appearing therefor,

IT IS ORDERED that Respondent, Hunter Douglas, Inc., appear before this Court, at the United States Court-

house in Newark, New Jersey, on the 20th day of Mar. 1985 at 9:30 A.M. or as soon thereafter as counsel can be heard, and then and there should (*sic*) cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concern or participation with them, should (*sic*) be enjoined and restrained as prayed in the Petition; and, then and there show cause, if any there be, why the District Court should not utilize the transcript of the Board's Administrative proceeding, as the record before the District Court without need of any further evidentiary hearings before the District Court;

IT IS FURTHER ORDERED that Respondent, Hunter Douglas, Inc., file its answer to the allegations of the Petition, including those allegations of the Board's Consolidated Complaint and Notice of Hearing relevant hereto incorporated in paragraph 5 of the Petition, with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at 970 Broad Street, Newark, New Jersey, 07102, on or before the 11th day of March, 1985, at 5:00 P.M., and,

IT IS FURTHER ORDERED that service of a copy of this order, together with a copy of the Petition and Exhibits upon which it is issued, be made forthwith upon Respondent, Hunter Douglas, Inc., by certified mail by an agent of Petitioner, and that proof of such serve be filed herein.

Done at Newark, New Jersey, this 7th day of Mar. 1985.

/s/ Dolores K. Sloviter
United States District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 85-1066

ARTHUR EISENBERG, Regional Director the Twenty-second Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Plaintiff, OPINION

-vs-

HUNTER DOUGLAS, INC. March 29, 1985
Newark, New Jersey

Respondent.

BEFORE:

HONORABLE CLARKSON S. FISHER, U.S.D.C.J.

Lorraine S. Nitti
Official Court Reporter
United States District Court
District of New Jersey

(p. 2) This is a petition for an injunction brought by the National Labor Relations Board pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. Section 160(j). The respondent, Hunter Douglas, Inc. is a Delaware Corporation engaged in the manufacture of window treatment components with its principal place of business at Maywood, New Jersey. Section 10(j) of the Act confers jurisdiction upon this Court to entertain this petition.

The NLRB consolidated three complaints brought by the United Electrical Radio & Machine Workers of America, Local 404, alleging unfair labor practices charges, and itself issued a complaint against respondent on December 20, 1984. The allegations against Hunter Douglas stem from actions it took in response to attempts by its workers and by Local 404 to have Local 404 installed as a bargaining representative of Hunter Douglas' workers at the Maywood facility. Prior to the events complained of here, Hunter Douglas' workers were not unionized. Specifically, the NLRB alleges that Hunter Douglas has violated its employees' rights to organize by using labor practices proscribed (p. 3) by Section 8(a)(1) of the Act[1], including (1) convening meetings of employee committees to bargain with employees and management concerning terms and conditions of employment; (2) soliciting employees' grievances and promising to remedy them in order to discourage support for Local 404; (3) granting certain employees benefits and remedying some employees complaints in order to discourage support for Local 404; (4) interrogating an employee regarding his union membership, activities and sympathies, and the union membership, activities and sympathies of the employee's colleagues; (5) terminating thirty-five second-shift employees over three days in October 1984 because of these employees' memberships in or support for Local 404; (6) discharging a second-shift supervisor, Jose Algarin, purportedly because of his refusal to

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[1] Section 8(a) It shall be an unfair labor practice for an employer — "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."

commit certain unfair labor practices designed to impede unionization efforts. The NLRB alleges also that section 8(a)(2) of the Act was violated by Hunter Douglas' efforts to use the employer-(p. 4) employee committees to impede unionization, and that section 8(a)(3) of the Act, pertaining to discrimination in tenure of employment because of support for unionization, was violated by the company's discharge of the thirty-five second-shift employees. The NLRB claims that the sum of Hunter Douglas' action is "a classic example of Union busting." (Petitioner's Brief at 6)

Hunter Douglas responds to these charges by stating that its actions were "motivated by legitimate business reasons and not by anti-union animus" (Respondent's Brief at 8). Respondent states that it made a "permanent layoff" of the thirty-five employees and Mr. Algarin because of its need to reduce labor costs and overhead expenses due to the loss of a large customer, J.C. Penney, and due to a marketing decision to transfer all retail blind orders to independent fabricators. (Respondent's Brief at 3). Hunter Douglas contends that its plant manager merely held meetings "with small groups of employees to discuss moral (sic) and production problems" at a time when the company had no knowledge that any union organizing was occurring among its employees (Respondent's Brief at 4-5). In its Answer Hunter Douglas denies each allegation of unfair labor practices made by the NLRB.

(p. 5) After the NLRB filed its charges on December 20, 1984, it held seven days of hearings during February and March 1985. The Board has not yet rendered its decision and order, and any such decision and order would not be effective until reviewed by the United States Court of Appeals for the Third Circuit. On February 27, 1985, the

Board authorized the petitioner to file the instant petition for injunctive relief so that the status quo will be preserved until final disposition by the Board of the unfair labor practices charges pending against Hunter Douglas.

I. *The Standard for a Section 10(j) Injunction*

The injunction made available by Section 10(j) was intended by Congress to curtail unfair labor practices during the pendency of the NLRB's administrative proceedings so as to ensure that the basic purposes of the National Labor Relations Act are not frustrated, and that whatever relief the Board grants will not have been dissipated by the passing of time and events. *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091 (3d Cir. 1984); *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 144 (3d Cir. 1975). See also S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (p. 6) (1947).[2] The test in this circuit for whether a district court should issue a section 10(j) injunction is well settled, and is twofold: First, a district court must find "reasonable cause" "to believe an unfair labor practice alleged by the petitioner has occurred, and second, (it must conclude that the relief sought by the NLRB is "just and proper." *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1078. "Reasonable

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[2] The statute reads: The Board shall have power upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice to petition any United States District Court, within any district wherein the unfair labor practice in in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

cause" has been construed to be a "low threshold of proof" on the petitioner's part, *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 905-06 (3d Cir. 1981), and, by analogy to section 10(l)[3] of the (p. 7) Act, to pose a "relatively insubstantial burden of proof to a regional director of the NLRB. *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084, (quoting *Hirsch v. Building & Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976). The *Suburban Lines* court substantially adopted the "reasonable cause" definition of the section 10(l) cases for use by district courts in section 10(j) cases including the proposition "that the district court need not be satisfied with the 'validity of the legal theory upon which (the Regional Director) predicates his charges.'" *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084 (quoting *Hirsch v. Building & Construction Trades Council*, 530 F.2d at 302.) In a section 10(j) case it is not for the court to decide whether in fact the unfair labor practices alleged by the Board have been committed. *Hirsch v. Building & Construction Trades Council*, 530 F.2d at 302. If the injunctive relief sought is denied, the district court must make a finding that the petitioner has advanced no substantial, non-frivolous legal theory, either explicit or implicit, regarding the charges, or that insufficient evidence exists to support any non-frivolous theory advanced by the petitioner. *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084.

(p. 8) Although few cases have ventured a definition of the "just and proper" language, the rule is that the in-

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[3] Section 10(l) states that the Board must seek injunctive relief where the alleged unfair labor practices are illegal organizational or jurisdictional strikes, secondary boycotts or hot cargo contracts.

junctive relief available from this court "is only that reasonably necessary to preserve the ultimate remedial power of the Board and is not to be a substitute for the exercise of" the Board's power. *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1091.[4] The "just and proper" standard is met where " 'there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted.' " *Hirsch v. Trim Lean Meat Products*, 479 F. Supp. 1351, 1360 (D. Del. 1980) (quoting *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967)). To be "just and proper," any injunctive relief fashioned must be "in the public interests." *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d at 143.

The request for injunctive relief as to each allegation is discussed in Part II against the standard (p. 9) outlined above.

Respondent Hunter Douglas argues that a Section 10(j) injunction can issue only when: (a) the general public interest in preserving the integrity of a collective bargaining relationship is compelling; (b) the NLRB's final remedial powers will be unable to provide a full remedy, and (c) general equitable principles are in support of issuance (Respondent's Brief at 13-14). Respondent's formulation has no support in the case law of this circuit and is without merit. It cannot be disputed that Congress in-

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[4] In *Suburban Lines, Inc.* the Court speculated that "an argument can be made" based partly on the political circumstances surrounding the section's enactment, that section 10(j) relief should be limited to "the extraordinary case." *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1091, n.26. There is no case law in this circuit to support this proposition and I take the Court's statement to be merely *obiter dicta*. The principle, however, is a sound one. *See McLeod v. General Electric Co.*, 366 F.2d 847, 849 (2d Cir. 1966), remanded, 385 U.S. 533 (1967).

tends and the courts consistently hold, that the propriety of a section 10(j) injunction is to be adjudged, contrary to what respondent implies, without reference to the historic criteria for injunctive relief, namely, no adequate remedy at law, inadequacy of money damages, irreparable injury to the enjoined party, and the public interest. *Hirsch v. Trim Lean Meat Products,* 479 F. Supp. at 1360-61.

Respondent does, however, make two noteworthy attacks on the appropriateness of injunctive relief here. Respondent argues that because no "ongoing bargaining relationship" exists now, or during the period covered by the NLRB's allegations, between it and Local 404, no injunction is necessary to protect the rights (p. 10) of employees regarding this "relationship." Respondent's argument implies that section 10(j) relief is inappropriate for situations where, as here, employee union organization is in an ascent, non-certified stage. Respondent cites no Third Circuit authority for this proposition. Indeed, if respondent's restrictive view of the employee activities protected through Section 10(j) actions was the rule, the very heart of the Act, Section 7, which secures for workers "the right to self-organization, to form, join, or assist labor organizations" would be imperiled. Respondent's argument in this regard is rejected.

Respondent argues further that because the Board has delayed in seeking 10(j) relief, such delay bespeaks the lack of need for injunctive relief, and that the petition, therefore, should be denied on equity grounds. The charges made by Local 404 were lodged with the NLRB on October 26 and December 7, 1984. The Board's complaint was issued on December 20, 1984. Hearings before the NLRB's administrative law judge were held on February 19, 20, 21

and on March 5, 6, 7, 8. During the course of those hearings, on March 4, 1985, the instant (p. 11) petition was filed in this Court.[5] This delay from the filing of the complaint to the filing of the section 10(j) petition "appears to be about average for the NLRB." *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1082 n.12. The delay here is not of the duration so as to make relief granted by this Court no more timely and effective than any final remedial relief granted by the NLRB. *Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622, 627 (8th Cir. 1977). Injunctive relief issued at this time, by this Court, three months after the filing of the Board's administrative complaint, surely would not be ineffectual. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975); *Maram v. Universidad Interamericana De Puerto Rico, Inc.*, 559 F. Supp. 255, 264 (D.P.R. 1983). This argument of respondent, similarly is without merit.

II. *Applying the Standard*

An analysis of the unfair labor practices alleged by the Board against the controlling guides of (p. 12) "reasonable cause" and "just and proper" yield the result that injunctive relief is appropriate here, though not to the extent requested by the petitioner.

Petitioner argues essentially that respondent's actions respecting the convening of employee committees to bar-

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[5] The administrative record before the Court, including the hearing transcript and exhibits received, numbers nearly 1500 pages, is comprehensive, and its use and reliance by this court appears to be intended by the parties. *Compare* Petitioner's Brief at 2 with Respondent's Brief at 7. References to the transcript are designated "Tr."; Petitioner's Exhibits are "Px."; Respondent's Exhibits are "Rx."

gain with management, the soliciting of employees' grievances, the granting to certain employees benefits and the remedying of certain complaints, and the interrogating of an employee about his union membership and activities are classic cases of unlawful labor practices. Hunter Douglas maintains that its actions were motivated by legitimate business concerns, and not anti-union bias, and that the facts presented by the administrative record support its position. But this court is not charged with weighing the credibility of the testimony adduced before the agency. *Eisenberg v. Wellington Hall Nursing Home, Inc.,* 651 F.2d at 906. The NLRB acts as primary fact-finder for actions brought under the Act. *Boire v. Pilot Freight Carriers, Inc.,* 515 F.2d at 1194. A district court's duty regarding the facts in a section 10(j) case is only to ensure that the reasonable cause threshold has been met. *Balicer v. Int'l Longshoremen's Ass'n, AFL-CIO,* 364 F. Supp. 205, 225-26 (D.N.J. 1973).

The record made during the administrative (p. 12A) proceedings and petitioner's brief sets out in fine detail the facts regarding the actions, other than terminations, Hunter Douglas allegedly took to preempt Local 404's and the employees' efforts to unionize, *see* Petitioner's Brief at 18-25, and a lengthy presentation is not necessary here. About the time respondent's plant manager first learned of employees' desire to unionize, he convened a series of meetings, on company time, with employee representatives, from both the first and second shifts, of various departments in the plant (Tr. 66, 279-89, 543-46). The meetings were held on company time and were designed to record problems employees had with their working conditions (Tr. 66, 278-79 572, 626). The plant manager would

set agendas and make announcements that certain problems had been resolved (Tr. 67, 70, 543-44), and later promulgated and distributed a series of "shop rules" dealing mostly with employee behavior but also proscribing solicitation of fellow employees and the distribution of literature in the plant (Tr. 75, 79, 289-90, 318-19, 627-30). The petitioner contends that this activity amounted to a "management dominated" labor organization designed to impede formation of an employees' union and is a violation of section 8(a)(1) and Section 8(a)(2) of the Act and should be enjoined. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 212-13 (1959); (p. 12B) *NLRB v. Erie Marine, Inc.*, 465 F.2d 104, 107 (3d Cir. 1972) (company "dealt" with "employee committees" on wages and other customary employee concerns); *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147 (D. Mass. 1983). Respondent's argument that by these committees, and by the actions taken by these committees, it intended something other than impediment of organizing activities is irrelevant. *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 739 (1961). Respondent's activities soliciting grievances from members of the committees and from other employees can be reasonably viewed, as petitioner claims, as "classic violations" of Section 8(a)(1) of the Act. The types of benefits conferred, the company's solicitations of grievances, and the timing of these actions are similar to the facts viewed as unfair labor practices in *Fuchs v. Jet Spray Corp.*, 560 F. Supp. at 1153. *See also St. Joseph's Hospital*, 247 N.L.R.B. 869 (1980). Respondent shall be enjoined from such activity.

The record reveals that various remedial, though minor, actions were taken by Hunter Douglas as the result

of its committee meetings and solicitations of employees' grievances (Tr. 67-70, 278-82, 543-44, 627, 1087-89). Respondent acted (p. 13) to improve various physical defects in workplace conditions, and discussed employee pay. This type of action by an employer when it is faced with the imminent prospect of labor organization formation is proscribed by Section 8(a)(1) of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) ("(t)he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove"). In *J. Coty Messenger Service, Inc.*, 272 NLRB No. 42, Slip Op. at 4-5 (1984) the Board held that an employer's granting of a $15 per week bonus to certain employees, its interrogation of employees and its promising to grant benefits is a "hallmark" violation of the Act. The Board wrote that this type of employer activity is "a course of action designed to convince the employees that their demands (would) be met through direct dealing with Respondent and that union representation could in no way be advantageous to them" (quoting *Teledyne Dental Products Corp.*, 210 NLRB 435, 439 (1974). The petitioner has carried his burden of proof that reasonable cause exists to believe that respondent's granting of these "benefits" was intended to thwart (p. 14) organizing efforts and that such actions constitute unfair labor practice.

Petitioner claims also that the plant manager's interrogations of Victor Nunez[6], a Local 404 member regarding Mr. Nunez's knowledge of union organizing activities (Tr. 620-24, 1097) is an unlawful labor practice.

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[6] Mr. Nunez, a first-shift worker, was not terminated by respondent (Complaint paragraph 10).

The plant manager asked Mr. Nunez if he were a union member, if others were members or leaning toward membership, and he asked Mr. Nunez to keep the conversations confidential (Tr. 624). The Third Circuit's language in *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 537-39 (3d Cir. 1983) provides support for a finding that reasonable cause exists to believe that this type of interrogation is a violation of Section 8(a)(1) of the Act. In *Graham Architectural Products* the Court held that employer questioning runs afoul of section 8(a)(1) when it reasonably can be viewed as tending to coerce employees into limiting or foregoing their section 7 rights. But it is not necessary for the Board actually to establish instances of coercive effect. *Graham Architectural Products*, 697 F.2d at 537-38. *See also Allied Lettercraft Co., Inc. and John Becht, Inc.*, 272 NLRB No. 97; (p. 15) 118 LRRM 1036 (September 28, 1984). It can be viewed reasonably that the purpose of the plant manager's questioning of Mr. Nunez and others was not made in the course of casual conversation but was done in an effort to gather intelligence on the activities of the union and its members and sympathizers.[7]

—A—

The issues that pose the greatest difficulty for the court, and the issues that consumed most of the time at oral

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[7] For example, the plant manager also interrogated Mr. Reynoldo Acevedo specifically regarding his intention of attending a union meeting scheduled for October 20, 1984 (Tr. 581). Mr. Acevedo replied that "I don't know anything and that I wasn't thinking of going to any meeting" (*Id.*). Mr. Acevedo, who was a first-shift employee remains in the employ of Hunter Douglas.

argument, are the allegedly illegal discharges of Mr. Algarin and the thirty-five second-shift workers.

Petitioner argues that respondent violated sections 8 (a)(1) and 8(a)(3) of the act by discharging the thirty-five workers over a three day period in October when it was confronted with the prospect of Local 404's success in organizing the employees (Petitioner's Brief at 39, 52). Petitioner asserts that considering respondent's knowledge of union activities, the animus it exhibited through its plant manager of such activities, and the timing of the discharge, the mass (p. 16) discharge can be viewed reasonably as an attempt to break the organizing efforts (Petitioner's Brief at 39). The petitioner's reasoning appears to be that the discriminatory discharges were precipitated by the execution of union authorization cards by these employees. The petitioner states that "(t)his case has the classic indicia of discriminatorily motivated employer conduct" (Petitioner's Brief at 39).

Hunter Douglas proffers a defense of legitimate business reason for the terminations. It argues that a shift in marketing strategy and the loss of the J.C. Penney account, and not any anti-union bias, were the reasons for the terminations (Respondent's Brief at 8-10). Respondent in the administrative proceeding, and in attachments to its Answer here, has produced documents indicating that its decision to rework its system of referring orders to independent fabricators was taken in advance of its knowledge of union organizing activity (Tr. 853-55, 934; Rx. H. K). Hunter Douglas argues also that it learned it was losing the "substantial" account of J.C. Penney only on October 18 (Tr. 843-44), in the midst of the intensifying organizing efforts. Hunter Douglas also has produced

some evidence that the volume of its business has declined (Tr. 839-88). The company represents that (p. 17) it has not hired any workers to replace those discharged, and that its workforce has suffered further attrition. At oral argument, and in its papers (Respondent's Brief at 19), respondent has contended that because it does not have the business to employ more workers, the public interest will be ill-served if this Court orders the reinstatement of the terminated employees.

The key question posed by an allegation of unlawful discharge is whether the employer acted so as to discourage union activity protected by Section 7 of the Act. *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 243 (3d Cir. 1976). The petitioner's burden is to establish that an employee would not have been discharged *but for* his union activity. *NLRB v. Wright Line*, 662 F.2d 899, 902-03 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The timing of a termination is "strong evidence" of section 8(a)(3) discrimination. *NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 942 (2d Cir.), *cert. denied*, 439 U.S. 864 (1978); *NLRB v. Treasure Lake, Inc.*, 453 F.2d 202, 203-04 (3d Cir. 1971). The validity of the reasons asserted for the discharge is a factor to be considered carefully. *Publishers' Offset, Inc.*, 225 NLRB 1045, 1047 (1976).

The stumbling block to the result of total deference by this Court to petitioner's conclusion that (p. 18) all of the terminations were unlawful is Hunter Douglas' defense of economic necessity. As proof of its defense, Hunter Douglas has produced a number of internal documents addressing production capacity reduction and the

reallocation of assembly work (Rx. H, I, J, K, L, M.)[8] Respondent relies also on the testimony of two of its officers, Messrs. Brown and Shouldis (Tr. 830-38, 848, 919-25), to establish that the mass discharge was coincidental with the surge of union activities and that it was in fact due to a "loss of business." The court's duty is to determine if the economic necessity defense is legitimate and whether, on balance, it is sufficient to conclude that the terminations, or some of the terminations, were unrelated to the employees' exercise of their section 7 rights.[9]

(p. 19) The determination is one based heavily on analysis of the facts as presented by the parties and the administrative record. It is clear that the burden for establishing that discharges in violation of section 8(a)(3) occurred remains ultimately with the petitioner. *See Behring International, Inc. v. NLRB*, 675 F.2d 83, 89 (3d

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[8] Petitioner argues that because respondent has not voluntarily produced documents revealing its weekly incoming orders, this court should draw an inference that such documents are favorable to petitioner's cause. But it is not that the "record is completely devoid of credible, documentary, or probative evidence of the alleged economic defense" as in *Fabricut, Inc.*, 238 NLRB 768, 769 (1978). The documents produced by respondent on the issue may not be complete or ideal, but as a matter of law they are not insufficient. Compare *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1342-43 (D.C. Cir. 1972) (documents withheld in face of Board subpoena).

[9] At oral argument, and in his Brief, petitioner took exception with the need at all for any layoffs. Petitioner's argument in this regard does not overcome the important facts that respondent laid off second shifts at its Washington and California facilities at a time close to the dates of the Maywood terminations (Tr. 921-22), and that since the terminations at Maywood respondent has not hired more workers.

Cir. 1982); *NLRB v. Wright Line,* 662 F.2d at 903. Still, however, in a 10(j) proceeding, this court need only be persuaded of the petitioner's "reasonable cause" to believe that the discharges were unlawful.

In light of the evidence before the Court I do not accept petitioner's claim that there is reasonable cause to believe all the discharges complained of were the product of respondent's anti-union animus, and I am satisfied that respondent's evidence on its defense of economic necessity overcomes the presumption in favor of injunction. Respondent has introduced sufficient evidence to establish that the lay-offs were the result of the marketing action taken in August and September, well before the discharges and as a result of the order volume decline caused by the loss of the J.C. Penney account. Indeed, it is more probable that the discharge of most of the workers was caused by business considerations. An employer's previous plans to transfer some of its (p. 20) business with the result that employees in the process of organizing are discharged can stand as a legitimate business defense. *Kobell v. Thorsen Tool Co.,* No. 82-1383 (M.D. Pa. Dec. 29, 1982) *reported at* 112 LRRM 2397, 2403. Similarly, the economic necessity defense is available even though the mass lay-off complained of is inconsistent with the employer's past practices of dealing with a poor business cycle. *Hasbro Industries, Inc.,* 254 NLRB 587, 593-94 (1981).[10]

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[10] Despite petitioner's claim that in the past Hunter Douglas discharged employees from all shifts when business was poor, the evidence is that in August 1983 the company laid off the entire third shift for much the same reason that it gives for the October 1984 lay-offs.

The validity of respondent's defense is supported by its not terminating those members of the first shift who signed union authorization cards, including a number of those workers identified by petitioner as having been well-involved in union activities, for example, Mr. Nunez, David Estrada, and Jose Ramos. Petitioner's theory is that respondent terminated the second-shift employees because union organizing activity was "stronger" on the second shift. In fact, petitioner has stated that 72 of the 118 unit employees on the first (p. 21) and second shifts executed union authorization cards (Petitioner's Mem. at 25; Tr. 615-16; PX. 46). Thirty-five out of forty-two employees on the second shift were terminated, but about an equal number of union members on the first shift were not. With petitioner's theory being primarily that union membership was the reason for the terminations, the fact that the union members on the first shift were not terminated weighs heavily against a finding that the second shift terminations were the product solely of anti-union animus. *Tapco Products Co.*, 253 NLRB 998, 1001. *Cf. NLRB v. Treasure Lake, Inc.*, 453 F.2d 202, 204 (3d Cir. 1971). The validity of respondent's defense is further supported by the events subsequent to the terminations. The evidence before the court is that respondent has not hired workers to take the places of those on lay-offs, it has not, apparently, discharged or harassed any of the union members on the first shift, and its volume of order is down. Actions taken by an employer subsequent to charges of unfair labor practices can be evaluated for evidence of anti-union animus. *J. & G. Wall Baking Co.*, 272 NLRB No. 157 (1984). The defense asserted by respondent is not matched by "strong uncontradicted evidence of dis-

crimination presented by" the petitioner. *L & M Radiator, Inc.*, 259 NLRB No. 20, at 146 (1981) (p. 22) *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470-71 (9th Cir. 1966). Accordingly, the court concludes that petitioner has not established that there is reasonable cause to believe that the terminations, as a whole, were in violation of the Act.

Testimony in the record indicates that unionization efforts were first begun by Yolanda Ramos, who left the company in August 1984 and who has no interest in this action. Subsequently, groups of Hunter Douglas employees met with Local 404 representatives to discuss unionization. The first meeting was held with just five workers, but attendance grew gradually. No dominant employee leaders of the unionization effort are apparent from examination of the record with the exception of Baudilio Ayala, the brother of Yolanda Ramos. Mr. Ayala was joined at early organizing meetings by other employees including Edna Torres, Armando Cruz, David Estrada, Joaquin Santana, Isabel Lopez, Olanda Lopez, Jose Ramos, Georgina Enriquez, Jorge Gonzalez, Gloria Carrasquillo, Louis Carrero and others. But not all of these workers were terminated. Indeed, irrespective of union membership, it appears that the only workers terminated were those employed on the second shift. For example, of the employees named above Estrada, Santana, Isabel Lopez and Olanda Lopez, and Jose Ramos were first shift (p. 23) employees and were not terminated. Mr. Cruz and Mr. Carrero, second shift employees, were not terminated but were offered positions on the first shift.[11] There is

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[11] Mr. Cruz was in fact terminated when he refused to transfer to the first shift (RX. N).

not reasonable cause to believe that the second shift terminations were in violation of the Act when it is established that the terminations were effected according to the company's neutral organizational structure, and where there is no evidence that the employer attempted to disrupt organizing efforts by discharging certain union members or all union members. The record is devoid of direct evidence that the respondent threatened or otherwise indicated that it would terminate those who joined or supported the union.

There are, however, two exceptions to this finding. The record indicates in some detail that Mr. Ayala's activities in behalf of the union were widespread and probably known to management (Tr. 12-16, 51-109). I find that respecting Mr. Ayala there is sufficient evidence in the record to support a reasonable cause belief that respondent terminated Mr. Ayala in violation of the Act. Similarly, there is overwhelming evidence that respondent's plant manager instructed that Anita (p. 24) Lavezzaris be terminated because of her suspected membership in or support for Local 404 (Tr. 340, 1093-94). Respondent shall be enjoined from failing to offer immediate reinstatement to Mr. Ayala and Ms. Lavezzaris.

—B—

Petitioner claims also that Jose Algarin was fired by respondent because he refused to engage in anti-union activities when requested (Petitioner's Brief at 34-39.) The administrative record contains evidence of respondent's attempts to have Mr. Algarin secure information about the organizing activity and about the involvement of employees (Tr. 335-37, 344-46, 1093-94.) The evidence also

tends to establish that Mr. Algarin was requested, but failed, to fire an employee, Anita Lavessaris, because of respondent's belief of Ms. Lavessaris' (*sic*) involvement in the union (Tr. 1093-94). Hunter Douglas responds to the allegations about Mr. Algarin's discharge with the argument that once it made the business decision to terminate the second-shift, it naturally terminated the supervisor of that shift (Respondent's Brief at 11; Tr. 850). Hunter Douglas notes also that Mr. Algarin testified before the ALJ that he did not believe he was terminated for the grounds alleged by the NLRB (Tr. 518-22), and that Mr. Algarin instead believes he was terminated because of discrimination based on national origin (RX. Q).

(p. 25) The case law would ordinarily support the conclusion that the termination of a supervisor under the circumstances here gives reasonable cause to believe that the employer has violated sections 8(a)(1) and 8(a)(3) of the Act. *Automobile Salesmen's Union v. NLRB,* 711 F.2d 383, 387-88 (D.C. Cir. 1983); *Belcher Towing Co. v. NLRB,* 614 F.2d 88, 91-92 (5th Cir. 1980). The problem with the facts here is that the terminated worker has to a large extent corroborated the employer's evidence that he was not discharged because of his union related activities. Respondent argues that Mr. Algarin's testimony and his employment discrimination complaint, are dispositive of the issue. The petitioner argues that Mr. Algarin's subjective beliefs or feelings are irrelevant to the issue of whether, objectively, Hunter Douglas discharged him in violation of his rights under the Act. The case of *A. A. Superior Ambulance Service,* 263 NLRB 499, 501, (1982), cited in a footnote in Petitioner's brief as authority for his argument does not aid the court's determination of this issue. Con-

trary to petitioner's assertion, Mr. Algarin's opinion of the reasons for his termination are entitled to weight in this court's reasonable cause evaluation.

*Fuchs v. Jet Spray Corp.*, 560 F. Supp. at 1155. By Mr. Algarin's filing of a national origin discrimination (p. 26) complaint in a New Jersey agency and the defense of economic necessity established by the respondent, petitioner has not proved that "but for" his union-related actions, Mr. Algarin would not have been discharged.

Respondent, therefore, shall offer immediate reinstatement to the discharged employees Baudilio Ayala and Anita Lavezzaris. Respecting the termination of other workers, including Mr. Algarin, the court finds that petitioner has not carried his burden of reasonable cause in light of respondent's defense of legitimate business reason, and that the public interest will be best served by entrusting the issue of the reinstatement of these employees to the administrative expertise of the NLRB.

III. *Conclusion*

For the foregoing reasons, an injunction will issue enjoining all of the alleged unfair labor practices complained of in the petition with the exception of the refusal to reinstate Mr. Algarin and certain of the other discharged workers. The injunction shall remain in effect until the Board disposes of the charges before it, but the injunction shall in any event expire six months from the date of this Opinion. *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d at 144; *Eisenberg v. Holland Rantos Co., Inc.*, 583 F.2d 100 (p. 27) (3d Cir. 1978). Counsel for petitioner shall submit an appropriate form of Order by April 5, 1985. No costs.

/s/ Lorraine S. Nitti, O.C.R.

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ARTHUR EISENBERG, Regional Director for Region 22 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

HUNTER DOUGLAS, INC.,

Respondent.

Civil No. 85-1066

April 9, 1985

ORDER GRANTING TEMPORARY INJUNCTION, IN PART, AND DENYING TEMPORARY INJUNCTION, IN PART

This cause came on to be heard upon the verified petition of Arthur Eisenberg, Regional Director for Region 22 of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, evidence, briefs, argument of counsel and the entire record in the case, has made and filed its Opinion in this matter finding and concluding that there is reasonable cause to believe that Respondent has engaged in, and

is engaging in, certain acts and conduct in violation of Section 8(a)(1), (2) and (3) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that it is just and proper to require Respondent to take the affirmative action set forth below and to refrain from interfering with the Section 7 rights of employees as set out below.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED, pending the disposition of the matters involved pending before the National Labor Relations Board, but not to exceed six months, the Respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, shall be enjoined from:

(1) Suggesting to employees that they form committees to deal with Respondent concerning wages, hours and other terms and conditions of employment.

(2) Convening meetings of committees of Respondent's employees, and bargaining with those committees concerning terms and conditions of employment.

(3) Soliciting employees' grievances and promising to remedy them in order to discourage them from supporting Local 404 or any labor organization.

(4) Granting benefits to employees and remedying employees' grievances in order to discourage employee support for Local 404 or any labor organization.

(5) Interrogating employees regarding union membership, activities, sympathies, and the union membership, activities, and sympathies of fellow employees.

(6) Laying off or discharging employees because they join, support, or assist Local 404, or engage in other protected concerted activities for mutual aid or protection.

(7) Refusing to reinstate Baudilio Ayala and Anita Lavezzaris.

(8) In any other manner restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

And further that Respondent shall be required to:

(1) Offer Baudilio Ayala and Anita Lavezzaris, immediate and full reinstatement to their former job classifications without prejudice to their seniority or other rights and privileges, by notifying each of them of said offer by certified mail (return receipt requested) sent on April 9, 1985, to their last known addresses, with a copy of such correspondent sent to the Court and the Board. Said unconditional offer of reinstatement is to be accepted by Baudilio Ayala and Anita Lavezzaris on or before April 22, 1985, by which date they are to report to work.

(2) Withdraw and withhold recognition of and assistance to the committees of employees, except that Respondent shall not vary or abandon the terms and conditions of employment it established through the employee committees.

In all other respects the injunctive relief prayed for in the Petition is denied.

Issued at Newark, New Jersey, this 9th day of April, 1985.

/s/ Clarkson S. Fisher
United States District Judge

## APPENDIX E

JD(NY)—74—85
Maywood, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

| | |
|---|---|
| HUNTER DOUGLAS, INC. | |
| and | Cases 22—CA—13511 |
| LOCAL 404, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA | 22—CA—13521<br>22—CA—13588 |

*Gary A. Carlson, Esq.* and *C. John Cicero, Esq.*, Newark, NJ, for the General Counsel.

June 19, 1985

*Bruce P. McMoran, Esq.* (*Norris, McLaughlin & Marcus*), Somerville, NJ, for the Respondent.

### DECISION

#### Statement of the Case

*D. BARRY MORRIS, Administrative Law Judge:* This case was heard before me in Newark, New Jersey during February and March 1985. Upon charges filed on 26 October, 5 November and 7 December 1984[1] a consolidated complaint was issued on 20 December alleging that Hunter Douglas, Inc. ("Respondent") violated Section 8(a)(1), (2), (3) and (5) of the National Labor Relations Act, as amended (the "Act"). Respondent filed an answer denying the commission of the alleged unfair labor practices.

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[1] All dates refer to 1984 unless otherwise specified.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally and file briefs. Briefs were filed by the General Counsel and by Respondent.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent, a corporation with a place of business in Maywood, New Jersey, is engaged in the manufacture, assembly and distribution of window blinds, other window (p. 2) coverings and their components. It annually ships from its Maywood facility goods valued in excess of $50,000 to consumers located outside of the State of New Jersey. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and I so find. In addition, Local 404, United Electrical, Radio & Machine Workers of America (the "Union") is a labor organization within the meaning of Section 2(5) of the Act.

### II. The Alleged Unfair Labor Practices

#### A. *The Issues*

The issues are:

1. Did Respondent's formation of employee committees at whose meetings Respondent solicited and adjusted grievances, violate Section 8(a)(1) and (2) of the Act?

2. Did Respondent promulgate a no-solicitation and no-distribution rule in violation of the Act?

3. Did Respondent unlawfully interrogate an employee concerning his Union activities?

4. Did Respondent discharge the employees working on the second shift because of their Union activities?

5. Did Respondent discharge a supervisor in violation of the Act?

6. Was Respondent's failure to recognize and bargain with the Union a violation of Section 8(a)(5)?

## B. *The Facts*

### 1. *Background*

Respondent is one of the world's major manufacturers of window coverings, which include various types of venetian blinds. Respondent both assembles blinds in its own plants and supplies components to firms which do their own assembly. The present case involves Respondent's plant in Maywood, New Jersey, where the company assembles blinds for customers located in the eastern part of the United States.

Prior to October 1984 two shifts of employees assembled blinds at the Maywood plant, where 63 employees worked on the first shift and 42 employees worked on the second shift. In addition, at various times employees worked on a third shift, assembling sales kits.

### 2. *The Union's Efforts to Organize*

In August 1984 Yolanda Ramos, an employee at the Maywood plant, contacted Jose Lugo, the Union business agent and told him that the employees wanted to form a (p. 3) union. A meeting was held on 29 August at the

Union's office at which six employees attended. A second meeting was held at the Union's office on 15 September at which time leaflets were distributed. Ayala, a second shift employee, handed out approximately 25 leaflets to fellow employees during September. He subsequently distributed aproximately 200 copies of another leaflet.

A third Union meeting was held at the Union's office on 29 September. Another leaflet was distributed and Ayala handed out approximately 200 copies to employees during the third week of October. On 20 October a fourth Union meeting was held at the Union's office, at which 11 employees attended. During this meeting Lugo handed out Union authorization cards to the employees.

3. *Meetings with Employees*

Jose Algarin, the supervisor of the second shift, who appeared to me to be a credible witness, testified that in late August or early September an anonymous letter came to the attention of John Santalla, the plant manager. The letter mentioned names of several employees who were trying to organize a union. One of the employees named was Maria Manjarez. Santalla asked Algarin if he thought that Manjarez would have "anything to do with the Union". Algarin replied that he did not think so. Yolanda Ramos ceased her employment with Respondent during the first week of September, shortly after the anonymous letter arrived at the Maywood plant. The day after she left Respondent's employment, Santalla called a meeting of the second shift employees, at which he told the employees that Yolanda left of her own free will and that her leaving did not have "anything to do with the Union". Santalla also said that he wanted to create a committee comprised of

employees from each of the different sections of the plant and that he would try to meet with the committee on a weekly basis. One of the tackers questioned Santalla about tackers' pay and Santalla replied that he would talk to the tackers after the general meeting. During the meeting between Santalla and the tackers one of the employees, Anita Lavzzaris, kept interrupting, complaining that the tackers' pay was too low. After the meeting Santalla asked Algarin the name of the employee who kept interrupting. After Algarin replied, Santalla told him "Get rid of her. I don't care what you do, get rid of her. If anybody has anything to do with the Union, she's one of them".

Employee committee meetings were held on 18, 20 and 27 September and 5 and 17 October. The meetings were held in the plant cafeteria on working time, with Santalla present at each meeting. At the first committee meeting of first shift employees, Nunez, who represented the employees on the first shift, mentioned that there were problems with the heating system and the air conditioning. Santalla wrote down the problems that the employees mentioned. At the first meeting of the committee of second shift employees Santalla had a list of problems which he had drafted at the first shift committee meeting. Santalla asked the second shift employee committee to read the draft and add any suggestions that they had. Santalla and the committee members discussed the conditions of the bathrooms, lack of cleanliness in the cafeteria, water coolers, lack of a public telephone for employees to use, lack of emergency lights in the plant, lack of an oven, malfunctioning vending machines and lack of lights in the employee parking lot. A question was also raised concerning pay.

Santalla said that he would try to resolve the problems. As the meeting was breaking up Santalla told the committee members to continue speaking to the other employees and that he was going to attempt to have weekly meetings.

(p. 4) At the second meeting Santalla distributed to the representatives a list of problems and solutions. Santalla told the committee members to review the list and suggest items that should be added. One employee said that the employees were interested in receiving more money. Santalla replied that the company was trying to initiate an incentive pay plan. At the third meeting Santalla distributed General Counsel Exhibit 6 which contained a list of problems and proposed solutions and the action that Respondent had taken or proposed to take to implement each of the solutions. In addition, Santalla asked each of the employees present where they had worked previously and whether there was a union. Some answered that there was a union and some answered that there was no union.

At the fourth meeting one of the employees brought up the issue of pay. Santalla replied that the question of pay was being reviewed. At this time medical insurance was also discussed. Santalla then presented the employees with a list of shop rules and asked the committee members for their opinion on the rules. The rules were distributed to the employees several days after the meeting. The rules list various offenses such as damaging or theft of company property, possession of drugs, punching another employee's timecard, fighting and gambling. Rule 32 prohibits "solicitation of an employee while either the employee doing the soliciting or the person being solicited is on working time". Rule 33 prohibits "distribution of

advertising material, handbills, or other literature in working areas of the plant at any time".

4. *Events Leading to the Termination of the Second Shift*

Respondent primarily sells through its network of 50-60 licensed independent fabricators. Approximately 90 percent of the company's window coverings are manufactured by these fabricators. During August Respondent confirmed its commitment to its fabricator network. It advised its retail customers that it would discontinue accepting orders outside of its fabricator group effective September first.

Around Labor Day J.C. Penney Co., one of Respondent's fabricators, approached Respondent advising it that it had oversold its capacity and asked for assistance. Respondent advised J.C. Penney that it would assist by producing blinds in its Maywood facility. The initial orders from J.C. Penney arrived during the first week of September. On 18 October O.B. Kelley, Vice-President of Respondent, learned that J.C. Penney had decided to discontinue placing orders with Respondent. In response to the loss of the Penney orders, George Shouldis, Vice-President and General Manager of Respondent, instructed John Brown, Director of Manufacturing, to immediately develop a plan to "reduce our manpower needs". On the same day Brown responded to Shouldis suggesting that the second shift be eliminated. On 24 October Respondent terminated Algarin, the supervisor of the second shift, together with 35 second shift employees.

### 5. *Authorization Cards*

At the Union meeting held on 20 October Lugo handed out Union authorization cards to the employees present. Employees who were at the meeting signed the cards at that time. Lugo also gave blank authorization cards to some of the employees to obtain the signatures of fellow employees. Ayala, Enriquez, Edna Torres, Jose Ramos, Tantillo and Nunez authenticated the cards that they themselves signed. Lugo (p. 5) witnessed four employees execute cards at the Union meeting on 20 October.[2] Ayala witnessed 14 employees sign cards on 22 October.[3] Enriquez witnessed four employees sign cards on 20 October[4] and eight employees sign cards on 22 October.[5] In addition, Jose Ramos witnessed Correa sign a card and Estrada witnessed Mora and Delgado sign cards.

Employees who solicited cards and to whom signed cards were returned authenticated 26 cards.[6] In addition,

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[2] Cruz, Lopez, Santana and Estrada.

[3] Stella Delahoz, Ghebrehiwet, Lopez, Martinez, Navarro, Padilla, Poma, Mario Rivera, Rich Rodriguez, Salazar, Ana Soto, Jose Soto, Asencio and Yohannes.

[4] Vasquez, Teresa Gonzales, de Jesus and Otero.

[5] Colon, Gambini, Nelson Santiago, Ponfilio Lopez, Jorge Gonzales, Cintron, Ana Luna and Morales.

[6] Ayala so authenticated cards executed by Carrasquillo, Dario Delahoz, Benita Gonzales, Julio Miranda, Quinones, Carmen Rivera, Romero, Antequera and Harmon. Torres so authenticated a card signed by Lamadrid. Ramos so authenticated cards signed by Chevere, Cruz, Deavila, Fraccet and Cayetano Luna. Nunez so authenticated cards signed by Arias, Elba Rodriguez, Angel Rosario, Lilibet Rodriguez, Irma Pagan, Casar Solorzano, Milagro Solorzano, Jesus Soto, Minier, Francisco Mirand and Pittman.

some cards were authenticated by persons who recognized the signature on the cards.[7]

By letter dated 26 October the Union requested recognition as the representative of Respondent's production and maintenance employees. Respondent rejected the request by letter dated 30 October.

*Discussion and Analysis*

A. *Employee Committees*

An employer violates Section 8(a)(1) and (2) of the Act by forming a committee of employees and dealing with that committee to solicit and resolve employee grievances. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959); *Lawson Co.*, 267 NLRB 463 (1983), enfd. in pertinent part 118 LRRM 2505 (6th Cir. 1985). Santalla announced in early September, after learning that the employees were beginning to organize, that he was going to form employee committees and that he would meet with them on a weekly basis to discuss problems and possible remedies. The committee meetings were called by Santalla, were held in the plant cafeteria and Respondent paid the employees for attending. Essentially the same employees attended each committee meeting. Santalla set the agenda for the committee meetings, was present at each meeting, drafted a list of what he wanted the committees to discuss and presented it to the committees. As Santalla himself testified, "I wanted input from them to open up to me to tell me

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[7] Algarin identified the signatures of Elsy Luna, Sylvester Fraticelli, Diaz, Nieduzak, Dombayci and Dulger. Enriquez, identified the signature of Nancy Fraticella and Ramos identified the signature of Rosa Cruz.

what they felt their problems were. I needed them to think that I was acting to their needs". Algarin credibly testified that Santalla told him that the committees were a "smoke screen" for the Union. Based upon the foregoing, I find that Respondent formed and dominated the employee committees in violation of Section 8(a)(1) and (2) of the Act. (p. 6)

B. *Solicitation of Grievances and Grant of Benefits*

As the Board recently stated in *J. Coty Messenger Service, Inc.*, 272 NLRB No. 42, slip op. at 5 (1984):

> the promise of increased benefits was a "deliberately embarked upon . . . course of action designed to convince the employees that their demands [would] be met through direct dealing with Respondent and that union representation could in no way be advantageous to them. Obviously such conduct must, of necessity, have a strong coercive effect on the employees' freedom of choice, serving as it does to eliminate, by unlawful means and tactics, the very reason for a union's existence".[8]

In the instant proceeding Respondent used the employee committees to solicit grievances. The committee members in response made suggestions with respect to pay; the conditions in the bathrooms and in the cafeteria; medical insurance; lack of a public telephone; emergency lights; lights in the employee parking lot and malfunctioning vending machines. In its answer to the complaint Respondent admitted that "during the months of September and October, 1984, it made improvements to production techniques and to the physical plant including but not lim-

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[8] *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

ited to: repair of broken restroom plumbing, exterminating and fumigating the plant, arranging for the installation of a new public telephone on the premises, repair of plant heating units, repair of exterior lighting, and posting of available positions". General Counsel Exhibit 26 contains the list of problems and solutions prepared by Santalla. In view of the above, I find that Respondent solicited grievances and granted benefits to the employees in violation of Section 8(a)(1) of the Act.

### C. *Promulgation of No-Solicitation and No-Distribution Rules*

When faced with a union organizing campaign "an employer may not for *union* reasons promulgate a no-solicitation and/or no-distribution rule". *Brigadier Industries Corp.*, 271 NLRB No. 104 slip op. at 4 (1984). While the Board held in *Our Way, Inc.*, 268 NLRB 394 (1983) that a rule prohibiting solicitation and distribution on behalf of a union during working time is presumptively valid, the presumption of validity may be rebutted by a showing that the rule was adopted for a discriminatory purpose. *State Chemical Co.*, 166 NLRB 455 (1967), enfd. 404 F.2d 1382 (6th Cir. 1968). In *State Chemical* among the factors cited by the Board in determining that General Counsel made out a *prima facie* case rebutting the presumption of validity were that the rule was promulgated at a time of intensive union activity and that Respondent was hostile to union organizational efforts. *Id.* Under such circumstances the Board held that it was incumbent upon the Respondent to show that the rule was required in order to maintain production or discipline. *Id.* In the instant proceeding, the rules were promulgated at a time of intense

Union activity. Employees had been attending Union meetings and handing out Union literature. Santalla created employee committees to serve as a "smoke screen" to thwart the Union. Santalla's attitude towards the Union was clear. He told Algarin to "get rid" of Lavezzaris and that "if anybody has anything to do with the Union, she's one of them". Under these circumstances I believe that General Counsel has made out a *prima facie* case rebutting the presumption of (p. 7) validity. Respondent has not shown that the rules were required in order to maintain production or discipline. Accordingly, I find that Respondent's promulgation of the rules was motivated by a purpose to interfere with the employees' right of self organization, in violation of Section 8(a)(1) of the Act. *State Chemical Co., supra*, 166 NLRB at 456.

D. *Employee Interrogation*

Nunez testified that during the first week of October he had a conversation with Santalla, his supervisor, concerning the Union. He testified:

> . . . I went up to the office. I went to get a band-aide, because I had wounded my finger. And when I went up there, I went behind his chair, and at that time he said to me that he wanted to ask me something. He wanted to know if it was true that I wanted to get into the Union again. I said, "John, you know that I promised you that I do not want to know anything about unions, and I am not going to join any unions. He said . . . that matter was something between he and I, and that no one else was to know about it.

Nunez testified that he had another conversation with Santalla concerning the Union, which took place in the area of the restrooms. Nunez testified:

> [Santalla] told me that he wanted to [ask] a confidential question of me. That he wanted to know if it was true that we were trying to get the Union back in the place. I told him . . . "I promised you that I wasn't going to get into a union, and I don't want to talk about it anymore".

Santalla confirmed the fact that he had one or two conversations with Nunez concerning unions. He testified:

> Q. Do you recall what happened during these conversations?
>
> A. Basically it was in passing have you heard anything about union activity.
>
> Q. What did he respond to you?
>
> A. His response was that he had no knowledge of union activity and wasn't active.

In *Rossmore House*, 269 NLRB 1176 (1984), the Board restated the test for evaluating whether interrogations violate the Act, as follows: "Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act". The Board cited *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3rd Cir. 1983), where the Court stated:

> (p. 8) In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. . . . If section 8(a)(1) deprived the

employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize.

In the instant proceeding, on the first occasion Nunez was not summoned to Santalla's office. Instead, he went there to get a Band-Aid at which time Santalla asked him if he "wanted to get into the Union again". During the second conversation the two met casually near the restrooms at which time Santalla asked Nunez whether "it was true that we were trying to get the Union back in the place". Under the totality of the circumstances, I find that Santalla's questioning of Nunez was not coercive and therefore was not in violation of Section 8(a)(1) of the Act.

E. *Elimination of the Second Shift*

The complaint alleges that Respondent discharged 35 employees who had been working on the second shift because of their Union activities. While 37 of the 42 employees on the second shift signed authorization cards, 36 employees on the first shirt also signed authorization cards but were not discharged.

Respondent maintains that the elimination of the second shift was motivated by legitimate business reasons. Thus, during August Respondent advised its retail customers that beginning September it would no longer accept orders from them but would direct such orders to its network of fabricators. On 18 October Respondent learned that J.C. Penney would no longer place its orders

with Respondent. On 23 October Shouldis instructed Brown to immediately develop a plan to reduce manpower. Brown responded on the same day with the plan to eliminate the second shift. Brown decided to eliminate the second shift rather than to spread the layoff over both shifts because of lower productivity on the second shift, greater management availability on the first shift, reduction in indirect costs and security considerations. When faced with decreased manpower needs at other plants Respondent similarly eliminated the second shift in October at its Kent, Washington plant and in January 1985 at its Ontario, California plant.

Under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 103 S. Ct. 2469 (1983), the Board requires that the General Counsel make a *prima facie showing* sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the "same action would have taken place even in the absence of the protected conduct".

(p. 9) In the instant proceeding Respondent had knowledge of the Union's activities, Santalla displayed animus towards the Union and the timing of the discharges was such that they occurred during the Union campaign. Nevertheless, it is questionable whether General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to eliminate the second shift. General Counsel's theory of the reason for the discharges

is not entirely clear. It would appear that General Counsel's basic thrust is that approximately 90 percent of the second shift employees signed authorization cards. However, the discharges occurred before Respondent was aware of the signing of the cards and before the Union demanded recognition. In addition, 36 employees on the first shift signed authorization cards but they were not discharged. In any event, I believe that Respondent has demonstrated that it decided to eliminate the second shift because of a reduction in orders and has satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct." Accordingly, the allegation is dismissed.

F. *Termination of Algarin*

The complaint alleges that Respondent discharged Alagarin, a supervisor, because he refused to commit unfair labor practices and failed to prevent the employees from unionizing. In mid-September, after one of the committee meetings, Santalla told Algarin to "get rid" of Lavezzaris. Algarin testified:

> . . . I explained, John, I have no reason—I just can't fire somebody like that. And he told me that he didn't care what I did. He asked me various questions, whether she was late, whether she was constantly absent. And he told me to keep an eye on her, and if she goofed anything up, to get rid of her. I never got the chance to get rid of the young lady. Because she went on disability about a month after that.

Algarin also testified that during October Santalla asked him "to look around and who would I think would have anything to do with the union". Algarin replied that he didn't know. Algarin further testified that Santalla told him:

> . . . that he was aware that some of the employees were trying to organize a union and that he believed that it was coming from my shift. And he asked me to listen to see what I could dig up. If I heard anything and let him know.

Algarin testified that Santalla never threatened that he would lose his job if Lavezzaris wasn't fired. He also testified that he did not believe he was terminated because of the fact that he did not fire Lavezzaris. Indeed, in mid-September when Algarin told Santalla that he could not fire Lavezzaris without a valid reason, Santalla instructed Algarin to "keep an eye on her, and if she goofed anything up, to get rid of her". There is no indication in the record that Algarin told Santalla that he would not go along with that suggestion. In addition, when Santalla told Algarin to "listen around to see what I could dig up", there is no indication that Algarin refused to do so.

Respondent argues that Algarin's supervisory position was eliminated because there was no need for the position once the second shift was eliminated. In this (p. 10) connection, on the memorandum of 23 October in which Brown proposed to eliminate the second shift, Shouldis noted "Implement immediately! What about supervisor reduction?" Brown replied on that same memorandum on 24 October that Algarin would also be terminated.

An employer may not discharge a supervisor for refusing to commit unfair labor practices or because the supervisor fails to prevent unionization. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 403 (1982), affd. 711 F.2d 383 (D.C. Cir. 1983). I do not believe that General Counsel has proven that Algarin was discharged because he

refused to fire Lavezzaris or because he failed to prevent the employees from unionizing. While in mid-September Algarin told Santalla that he could not fire Lavezzaris without a valid reason, he at no time indicated to Santalla that he would not go along with Santalla's suggestion of looking for a pretext. In addition, he did not indicate to Santalla that he would not be on the lookout for Union supporters, as requested by Santalla. In any event, inasmuch as Algarin was the supervisor of the second shift, since the second shift was eliminated the need for Algarin's employment no longer existed. Accordingly, the allegation is dismissed.

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G. *Authorization Cards*

General Counsel introduced the authorization cards of 73 employees. General Counsel relied upon four methods to authenticate the cards: (1) testimony of the employees who signed the cards; (2) testimony of card solicitors who observed employees signing cards; (3) testimony of employees who received the cards from signers; and (4) testimony of individuals familiar with the handwriting of the signers.

Ayala, Enriquez, Torres, Ramos, Tantillo and Nunez authenticated the cards that they themselves signed. Cards may also be authenticated by a witness who actually saw the employee sign the card. *McEwen Mfg. Co.*, 172 NLRB 990, 992 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969).

Thus, Logo witnessed four employees execute cards; Ayala witnessed 14 employees sign cards; Enriquez witnessed 12 employees sign cards; Ramos witnessed one employee sign a card; and Estrada witnessed two employees sign cards.

In addition, cards may be authenticated through the testimony of employees who solicited them and to whom signed cards were returned. *McEwen Mfg. Co., supra,* 172 NLRB at 992. Ayala so authenticated cards executed by nine employees; Torres so authenticated a card signed by one employee; Ramos so authenticated cards signed by five employees; and Nunez so authenticated cards signed by 11 employees.

On 24 October there were 118 employees in the unit. Thus, the above-mentioned 65 cards represent a majority of the unit employees. It is therefore unnecessary for me to decide whether the eight cards authenticated by Algarin, Enriquez, and Ramos on the basis of their being familiar with the signatures on those cards, were properly admitted. In this connection I note, however, that non-expert opinion based on familiarity may be utilized to establish the genuineness of a signature. Federal Rule of Evidence 901(b)(2); *U.S. v. Saputski,* 496 F.2d 140, 142 (9th Cir. 1974); 3 Wigmore, *Evidence,* Sections 693-94 (Chadbourne rev. 1970). (p. 11)

### H. *Refusal to Bargain*

On 29 October Respondent received the Union's letter dated 26 October in which the Union requested recognition. Respondent rejected the request on 30 October. The complaint alleges that since 29 October Respondent has refused to recognize and bargain with Local 404 as the exclusive collective bargaining representative of the unit. General Counsel requests that I issue a Gissel Bargaining Order.

In *J. Coty Messenger Service, Inc., supra,* 272 NLRB No. 42 the Board stated (slip op. at 2):

> In determining whether a bargaining order is warranted to remedy the Respondent's misconduct in this case, we applied the test set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). There, the Court described two types of situations where bargaining orders are appropriate: (1) "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices; and (2) "less extraordinary" cases marked by "less pervasive" practices. The Court thus approved the Board's use of a bargaining order in "less extraordinary" cases where the employer's unlawful conduct has a "tendency to undermine [the union's] majority strength and impede the election processes".

In *Gissel*, the Court pointed out (395 U.S. at 615):

> We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order.

The only violations which I have found in this proceeding are those relating to the employee committee meetings and the promulgation of the no-solicitation and no-distribution rules. The meetings with employees occurred on 18, 20, and 22 September and 5 and 17 October. The no-solicitation and no-distribution rules were promulgated on 17 October. It was between 20 and 24 October, subsequent to the meetings and to the promulgation of the rules, that the Union obtained the authorization cards from the employees.[9] The activities which I have found to have violated the Act did not "hinder" the Union from "obtaining a card majority". See *Allbritton Communications, Inc.*, 271

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[9] Thus on 20 October the Union obtained 16 cards, on 21 October one card, on 22 October 39 cards, on 23 October eight cards, and on 24 October nine cards.

NLRB No. 39, slip op. at 14 (1984). Similarly, in *Sidex Furniture Corp.*, 270 NLRB No. 89 (1984) the Board did not impose a bargaining order even though Respondent violated the Act by interrogating its employees in regard to their Union activities and by granting a general wage increase during the organizational period. Under the circumstances I do not believe that Respondent's "conduct makes the possibility of holding a fair election" in the appropriate unit "so unlikely as to warrant a bargaining order". *Allbritton Communications, Inc., supra,* 271 NLRB No. 39, slip op. at 14. (p. 12)

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By establishing employee committees and soliciting grievances and promising to remedy them in order to discourage employees from supporting Local 404 or any other labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

4. By remedying employee grievances and granting benefits in order to discourage employee support for Local 404 or any other labor organization, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By promulgating no-solicitation and no-distribution rules for the purpose of interfering with Union organi-

zation, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not violate the Act in any other manner alleged in the complaint.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[10]

ORDER

Respondent, Hunter Douglas, Inc., its officers, agents, successors and assigns, shall: (p. 13)

1. Cease and desist from:

(a) Forming committees of employees and convening meetings of such committees to solicit employee grievances and to remedy such grievances in order to discourage em-

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ployees from supporting Local 404 or any other labor organization.

(b) Granting benefits to employees and remedying their grievances in order to discourage employee support for Local 404 or any other labor organization.

(c) Promulgating a no-solicitation rule or a no-distribution rule in order to discourage its employees from supporting Local 404 or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw all recognition from, and completely disestablish the employee committees formed in September 1984, and refrain from recognizing them or their successors as representatives of any of its employees for the purpose of dealing with them concerning wages, grievances, rates of pay or other conditions of employment.

(b) Post at its facility in Maywood, New Jersey copies of the attached notice marked "Appendix ."[11] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Respondent's author-

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[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

ized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply. (p. 14)

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.[12]

Dated Washington, D.C. 19 June 1985.

/s/ D. Barry Morris
Administrative Law Judge

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[12] General Counsel's Motion to Correct Transcript is denied.

APPENDIX

JD(NY)—74—85

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the
UNITED STATES GOVERNMENT

AFTER A HEARING IN WHICH ALL PARTIES WERE AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IT HAS BEEN FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE.

WE WILL NOT form employee committees or convene meetings of such committees to solicit employee grievances, to remedy grievances or grant benefits to employees, for the purpose of discouraging employee support for Local 404 or any other labor organization.

WE WILL NOT assist, dominate or contribute support to the employee committees which were formed in September 1984, or any other labor organization.

WE WILL NOT promulgate or enforce no-solicitation or no-distribution rules in order to discourage our employees from joining, supporting or assisting Local 404 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL withdraw all recognition from, and completely disestablish the employee committees formed in September 1984 and WE WILL NOT recognize them or their successors as the representatives of any of our employees for the

purpose of dealing with us concerning wages, grievances, rates of pay or other conditions of employment.

HUNTER DOUGLAS, INC.
(Employer)

Dated this.....By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

National Labor Relations Board
Region 22
Federal Building—Room 1600
970 Broad Street
Newark, New Jersey 07102
Tel. No. (201) 645-3652

## APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

HUNTER DOUGLAS, INC.

and

LOCAL 404, UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA, Case 22-CA-13511
22-CA-13521

ORDER TRANSFERRING PROCEEDING TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.

IT IS HEREBY ORDERED, pursuant to Setion 102.45 of National Labor Relations Board Rules and Regulations, that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D.C., 19 June 1985.

By direction of the Board:

John C. Truesdale
Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the pages attached hereto. *Note particularly the limitations on length of briefs and on size of paper.*

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board in Washington, D.C., on or before 12 July 1985.

## APPENDIX G

277 NLRB No. 123

DDeJ
D—3343
Maywood, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

HUNTER DOUGLAS, INC.

and

Cases 22—CA—13511
22—CA—13588

LOCAL 404, UNITED
ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA

December 23, 1985

DECISION AND ORDER

On 19 June 1985 Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

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[1] On 21 August 1985 the General Counsel filed a motion to withdraw the charge in Case 22—CA—13521 which alleged that Respondent failed to recognize and bargain with the Union in violation of Sec. 8(a)(5) and (1) of the National Labor Relations Act. On 3 September 1985 the Board, in an unpublished Order, granted the motion. Accordingly, Case 22—CA—13521 has been severed and remanded to the Regional Director for further appropriate action.

The judge found that the Respondent violated Section 8(a)(1) and (2) of the Act by forming employee committees, at whose meetings Respondent solicited and adjusted grievances and promised benefits; the judge also found a violation of Section 8(a)(1) of the Act in Respondent's promulgating a (p. 2) no-solicitation and no-distribution rule.[2] The discharge of Supervisor Jose Algarin, as part of Respondent's second-shift layoff, was not found by the judge to violate the Act, as he concluded the termination was not due to Algarin's refusal to commit unfair labor practices or prevent employees from unionizing. We agree.

The judge also found that Respondent's layoff of its second shift employees and Respondent's interrogation of an employee concerning his union activities did not violate the Act. After careful review of the entire record, we disagree with the judge for the reasons below.

The Board held in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied. 455 U.S. 989, that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer's action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place absent the protected conduct "by a preponderance of the evidence," *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). If an employer fails to satisfy

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[2] No exceptions were filed to these findings.

its burden of persuasion, a violation of the Act may be found. *Bronco Wine Co.*, 256 NLRB 53 (1981).

We are not persuaded by the judge's findings that Respondent eliminated the second shift because of a reduction in orders and has satisfied its burden (p. 3) of demonstrating that the same action would have taken place even in the absence of the protected conduct. Although the judge found that the Respondent knew of the Union's activities, that the mass layoff occurred during the union campaign, and that John Santalla, the plant manager, manifested union animus, the judge's analysis fails to consider record evidence that demonstrates that the second shift was selected for layoff in order to defeat the union campaign.

Respondent manufactures components of window coverings, including venetian blinds, and it assembles window coverings from those components. Respondent supplies components to fabricators who then assemble and sell the coverings. Approximately 90 percent of Respondent's production is of components, and the remaining 10 percent involves assembly or fabrication of coverings. Respondent reaffirmed its commitment to its network of 50 to 60 fabricators in the spring of 1984.[3] One consequence was that Respondent would assemble coverings only for its fabricators in the event fabricators were unable to meet their own commitments. Otherwise, effective 1 September, orders received by Respondent for coverings were to be directed to one of its fabricators.

George Shouldis, Respondent's vice president and general manager and John Brown, Respondent's director of manufacturing, met on several occasions between March

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[3] All dates hereafter are in 1984 unless otherwise indicated.

and August in order to plan a labor reorganization. The reorganization was necessary as a result of the increasing reliance on their fabricator network. Around the beginning of September, when Respondent began (p. 4) augmenting assembly of blinds for one of its fabricators, J. C. Penney, Shouldis and Brown had not arrived at a plan of reorganization, partly because the changes contemplated were not thought to be major and partly because fabricators' orders were unpredictable and sporadic. On 18 October the Respondent was informed that Penney would not be submitting any additional orders. On 23 October Shouldis directed Brown to devise a personnel reduction immediately. Brown sought Santalla's recommendation, which was to eliminate the second shift. The following day, 24 October, the second shift was laid off.

Shouldis testified that Penney s notice of termination was not a loss because Respondent did not rely on Penney's business and had not solicited this business. Respondent assembled coverings for Penney because Penney had committed itself beyond its fabrication capability for coverings in a nationwide retail campaign. Brown testified that Penney's account was one of many factors in the second shift layoff, but that the layoff was not precipitated by any one event. Brown testified that he and Santalla had discussed plant reorganization, out of concern for slow work. When asked why Respondent could not have given employees more notice before loss of their jobs, Shouldis testified that he thought it best not to prolong any agony.

Although Brown denied having any particular knowledge of union activity before 29 October when the Union demanded recognition, Santalla was very much aware of the union activity. This knowledge is not only reflected in

the establishment of employee committees, the soliciting and remedying of grievances, and in the institution of a no-solicitation/no-distribution rule, all of which were done unlawfully, but in Santalla's other attempts to interfere with employees' protected activities. Santalla directed Jose Algarin, the second-shift supervisor, to discharge, under pretext if (p. 5) necessary, employees whom Santalla believed to be union activists or sympathizers. One employee, Anita Lavezzaris, kept interrupting Santalla with complaints of low pay during an employee committee meeting. After that meeting, Santalla told Algarin, "I don't care what you do, get rid of her. If anybody has anything to do with the Union, she's one of them."

Santalla also sought to gather information on the Union's progress. Not only did he ask Jose Algarin which employees might be involved in the union campaign, he asked employees themselves about their knowledge and involvement. Thus, on 20 October, Santalla asked second-shift employee Reinaldo Acevedo if he was going to the union meeting that day at the Union's office. Santalla believed that the second shift was the focus of union activity and he told Algarin to rid the second shift of its "union teeth."

Respondent's elimination of the second shift on 24 October varied from previous layoffs in the manner in which the layoff was executed. Shouldis and Georgina Enriquez testified that, in laying off the third shift in August 1983, Respondent attempted to reassign third-shift employees among the other two shifts. The impact of another layoff in January 1984 was spread among both the first and second shifts. In those layoffs, Respondent endeavored to retain the more senior and productive em-

ployees. Regarding the October layoffs, Brown testified that he thought it best to eliminate the second shift due to its lower productivity, greater management availability on the first shift, reduction in indirect costs, and security considerations. However, this fails to explain why Respondent deviated from its previous practice of considering individual seniority or qualifications.[4]

(p. 6) Considering that Respondent's officers, Shouldis and Brown, had discussed personnel reorganization for some time, and considering that Penney's withdrawal of further orders was not seen as catastrophic, it is not credible that they would accept Santalla's recommendation and act upon it with such great haste. Additionally, this layoff deviated from previous layoffs, in that it involved elimination of an entire shift rather than a reduction in the number of overall employees based on individual considerations. Indeed, Santalla's undisputed desire to rid the second shift of its union sympathizers goes a long way in explaining how and why the second shift was eliminated in the manner in which it was. Accordingly, we conclude that the Respondent has failed to carry its burden under *Wright Line* of persuading by a preponderance of the evidence that it would have laid off the second shift in the absence of union activity. The abruptness of the layoff, coming as it did at the time of the union drive, supports an inference of illegal motivation. *Corrugated Partitions*

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[4] Santalla's testimony that the seven or so employees retained were not laid off due to their having been absent at the time the layoff was announced, or were moved to the first shift for reasons of special knowledge or to fill the first shift does not demonstrate adherence to past practice.

*West, Inc.*, 275 NLRB No. 126 (June 28, 1985), JD slip op. at 21. We find the layoff of second-shift employees would not have happened as it did were it not for the desire of the Respondent to impede union activity and therefore violated Section 8(a)(3) and (1) of the Act.

As found by the judge, Santalla questioned employee Victor Nunez twice about union activity and Nunez' involvement in union affairs. The first interrogation happened in Santalla's office, where Nunez had gone for a Band-Aid. Santalla asked him if it was true he wanted to get into the Union again. The other instance of interrogation occurred in the plant, near the restrooms. Santalla inquired if it was true Nunez was trying to get the Union back into the place. Both times Santalla told Nunez that his inquiries were confidential. While Nunez testified that he was a union supporter, this support was not openly displayed. Santalla's questioning of Nunez had no (p. 7) legitimate purpose and the questions, obliquely, were designed to determine Nunez' involvement is protected activities. As we recognized in *Corrugated Partitions West, Inc.*, 275 NLRB No. 126 (June 28, 1985), where the interrogation was engaged in by the plant manager, in a calculated fashion, such interrogation reasonably tends to interfere with the exercise of employees' protected rights. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). See also *Allied Lettercraft Co.*, 272 NLRB 612 (1984). Accordingly, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) of the Act by interrogating Nunez.

Amended Conclusions of Law

Insert the following after Conclusion of Law 5 and renumber Conclusions of Law 6 and 7 as 8 and 9, respectively.

"6. The General Counsel made a prima facie case under Section 8(a)(3) and (1) of the Act that union animus was a motivating factor in the Respondent's layoff of second-shift employees, and the Respondent has failed to show by a preponderance of the evidence that those employees would have been laid off in the absence of union activity and Respondent's animus.

"7. The Respondent violated Section 8(a)(1) of the Act by interrogating employee Victor Nunez as to the presence and extent of any union activity and of the involvement of himself and other employees in the union campaign."

Amended Remedy

In addition to those remedies ordered by the judge, we shall order the Respondent to offer Gustavo Acevedo, Santos Asencio, Raudilio Ayala, Gloria Carrasquillo, Samuel Cintron, Rosura Colon, Armando Cruz, Dario DeLahoz, Stella DeLahoz, Nursel Dulger, Georgina Enriquez, Melva Finley, Virginia Gambini, Freweiwi Ghebrehiwet, Jorge Gonzalez, Harry Harmon, Louis LeMadrid, Ana Luna, Anita Lavezzaris, Gilberto Martinez, Julio Miranda, Edna Morales, (p. 8) Jose Morales, Irma Morton, Cesar Navarro, Edward Nieduzak, Flor Padilla, Wilfredo Poma, Romona Quinonez, Carmen Rivera, Richard Rodriquez, Jesus Salazar, Jesus Soto, Peter Tantillo, and Edna Torres immediate and full reinstatement to their former jobs or,

if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. The loss of earnings and benefits incurred by these employees as a result of the unlawfully motivated discharges shall be determined as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

## ORDER

The National Labor Relations Board orders that the Respondent, Hunter Douglas, Inc., Maywood, New Jersey. its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Forming committees of employees and convening meetings of such committees to solicit employee grievances and to remedy such grievances in order to discourage employees from supporting Local 404 or any other labor organization.

(b) Granting benefits to employees and remedying their grievances in order to discourage employee support for Local 404 or any other labor organization.

(c) Promulgating a no-solicitation rule or a no-distribution rule in order to discourage its employees from supporting Local 404 or any other labor organization. (p. 9)

(d) Discharging or laying off its employees for engaging in union or other protected activity.

(e) Coercively interrogating any employees about their union support or activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw all recognition from, and completely disestablish, the employee committees formed in September 1984, and refrain from recognizing them or their successors as representatives of any of its employees for the purpose of dealing with them concerning wages, grievances, rates of pay, or other conditions of employment.

(b) Offer Gustavo Acevedo, Santos Asencio, Baudilio Ayala, Gloria Carrasquillo, Samuel Cintron, Rosura Colon, Armando Cruz, Dario DeLahoz, Stella DeLahoz, Nursel Dulger, Georgina Enriquez, Melva Finley, Virginia Gambini, Freweiwi Ghebrehiwet, Jorge Gonzales, Harry Harmon, Louis LaMadrid, Ana Luna, Anita Lavezzaris, Gilberto Martinez, Julio Miranda, Edna Morales, Jose Morales, Irma Morton, Cesar Navarro, Edward Nieduzak, Flor Padilla, Wilfredo Poma, Romana Quinonez, Carmen Rivera, Richard Rodriquez, Jesus Salazar, Jesus Soto, Peter Tantillo, and Edna Torres immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision. (p. 10)

(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Maywood, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. (p. 11)

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. 23 December 1985

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

## APPENDIX H

DIRECT DIAL
597-3136

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

November 6, 1986

HUNTER DOUGLAS, INC.,

Petitioner,

v.

NATIONAL LABORS RELATIONS BOARD

Respondent.

TO: Elliott Moore, Esq.
Marc B. Seidman, Esq.
Paul J. Spielberg, Esq.
Bruce P. McMoran, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos. 85-3711 and 86-3010 and copies are enclosed herewith.

PETITION FOR REHEARING (FRAP 40)

Your attention is specifically directed to Chapter VIII B of the Court's Internal Operating Procedures.

B. *Rehearing In Banc.*

Rehearing in banc is not favored and ordinarily will not be ordered except

(1) where consideration by the full court is necessary to secure or maintain uniformity of its decisions, or

(2) where the proceeding involves a question of exceptional importance.

This Court does not ordinarily grant rehearing in banc where the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

Nor, except in rare cases, has the court granted rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

When a petition for rehearing has been filed by a party as provided by FRAP 35(b) or 40(a), unless the petition for panel rehearing under 40(a) states explicitly it does not request in banc hearing under 35(b), it is presumed that such petition requests both panel rehearing and rehearing in banc.

Filing Time

A petition may be filed within 14 days after entry of judgment. No extension will be granted save for the most compelling reasons. The petition must be *received* in the Clerk's office within the 14 day period.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Oral argument in support of the petition will not be permitted.

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, the petition shall contain, so far as is pertinent, the following statement of counsel:

> "I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniform of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],
>
> Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

Counsel is reminded that sanctions may be imposed for the filing of a frivolous petition for rehearing. *See* Fed. R. App. p. 46(c).

Form

The 15 page limit allowed by the Rule shall be observed.

Number of Copies

An original and 14 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Rule 22.1

Attachments

Attach to each petition for rehearing a copy of the judgment, order or decision of the

Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Bill of Costs (FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment. The bill of costs must be *received* in the Clerk's office within the 14 day period.

Form — Counsel desiring to have costs taxed against the unsuccessful party under Rule 39, FRAP is requested to furnish an itemized and verified statement from the printer showing the actual costs per page for reproducing the brief and appendix (if any). Proof of service of the bill of costs must be attached to the bill.

Mandate (FRAP 41)

Issuance Time — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. A motion for stay of mandate should be promptly filed if parties intend to file a petition for writ of certiorari to the Supreme Court of the United States.

Sally Mrvos, Clerk

Enclosures
Rev. 5/86

## APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3711 and 86-3010

Hunter Douglas, Inc.

Petitioner in No. 85-3711
Respondent in No. 86-3010

v.

National Labor Relaitons Board,

Respondent in No. 85-3711
Petitioner in No. 86-3010

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges*

The petition for rehearing filed by Hunter Douglas, Inc., Petitioner/Cross-Respondent, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 2, 1986

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1410

# In the Supreme Court of the United States

OCTOBER TERM, 1986

HUNTER DOUGLAS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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15 pp

## QUESTIONS PRESENTED

1. Whether petitioner is precluded from raising in this Court an issue that was not raised before the National Labor Relations Board.

2. Whether, assuming that the question is properly presented, a ruling by a district court in an interlocutory proceeding that there was no reason to believe that a layoff of workers violated Section 8(a)(1) and (3) of the National Labor Relations Act precluded the Board from later finding such a violation in deciding the case on the merits.

3. Whether substantial evidence supported the Board's decision that petitioner violated Section 8(a)(1) and (3) of the Act by discharging most of its second shift employees because of their union activity.

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OCTOBER TERM, 1986

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No. 86-1410

HUNTER DOUGLAS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-30a) is reported at 804 F.2d 808. The opinion and order of the National Labor Relations Board (Pet. App. 85a-96a), including the decision of the administrative law judge (Pet. App. 57a-80a), are reported at 277 N.L.R.B. No. 123.

## JURISDICTION

The decision of the court of appeals was entered on November 6, 1986. The order of the court of appeals denying rehearing was entered on December 2, 1986 (Pet. App. 101a). The petition for a writ of certiorari was filed on February 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a manufacturer and distributor of window coverings and their components. In addition to assembling the window coverings at its own plants, it supplies components to fabricators, who then assemble and sell the coverings. This case involves petitioner's Maywood, New Jersey, plant, one of several that it maintains throughout the United States. Prior to October 1984, petitioner operated two shifts at the Maywood plant. Sixty-three employees worked on the first shift, and 42 worked on the second. Pet. App. 3a, 59a, 87a.

In August 1984, a second shift employee contacted the Union's[1] business agent and told him that the Maywood plant employees wanted to form a union. Four meetings were held during August, September, and October 1984, and union authorization cards were handed out at one of the meetings. Also during that period, union leaflets were distributed at the plant. Pet. App. 3a-4a.

Late in August or early in September of 1984, petitioner learned of the campaign to organize a union. Shortly thereafter, plant manager John Santalla established employee committees with whom he met on several occasions. Employee concerns relating to pay, medical insurance, and working conditions were discussed at the meetings, and Santalla promised to try to resolve the employees' problems. At one of the meetings Santalla questioned the employees as to whether their previous employers had had a union. At another meeting, Santalla distributed to the employees a list of proposed shop rules that prohibited, inter alia, distribution of literature in plant working areas and solicitation of employees while either the soliciting or solicited employee was on working time. Pet. App. 4a.

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[1] Local 404, United Electrical, Radio & Machine Workers of America.

During the organizational campaign, Santalla interrogated employee Victor Nunez on two occasions about union activity at the plant and about Nunez's involvement in such activity. He told Nunez to keep the conversations confidential. In addition, Santalla instructed second shift supervisor Jose Algarin to "get rid of" an employee whom Santalla suspected was involved with the Union. Santalla further instructed Algarin to let him know who was involved in the union campaign, remarking that he believed the union organizational effort was coming from the second shift. Pet. App. 4a-5a, 61a, 72a-73a.

During the spring and summer of 1984, petitioner decided to discontinue its retail sale of coverings and to limit its activity to producing component parts and selling them to fabricators. In August 1984 it implemented that decision by notifying its retail customers that, effective September 1, 1984, it would discontinue accepting orders. Around Labor Day, J.C. Penney, one of petitioner's licensed fabricators, advised petitioner that it had oversold its capacity and therefore needed assistance in manufacturing blinds. Initial orders from Penney arrived early in September. On October 18, 1984, petitioner learned that Penney had decided to discontinue further orders. Five days later, in response to the loss of the Penney orders, George Shouldis, petitioner's Vice President and General Manager, instructed John Brown, Director of Manufacturing, to develop a plan to reduce Hunter Douglas's manpower needs. That same day, Brown, after consultation with Santalla, recommended elimination of the second shift. The following day, second shift supervisor Algarin and 35 of the 42 second shift employees were terminated. Pet. App. 5a-6a, 63a.

On October 29, 1984, petitioner received a Union request for recognition as the representative of petitioner's production and maintenance employees. Petitioner rejected that

request, and the Union then filed three unfair labor practice charges. Those charges were consolidated in a complaint issued by the Regional Director. Pet. App. 6a-7a, 65a.

2. Following a hearing, an Administrative Law Judge (ALJ) found that petitioner violated Section 8(a)(1) and (2) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1) and (2), by establishing employee committees, soliciting grievances, granting benefits, and promulgating no-solicitation and no-distribution rules, all for the purpose of interfering with the employees' organizational rights. On appeal, the National Labor Relations Board (the Board) affirmed those rulings. Two rulings of the ALJ, however, were overturned by the Board. First, contrary to the ALJ, the Board found that petitioner violated Section 8(a)(1) of the Act by interrogating Nunez. Second, the Board found, again contrary to the ALJ, that petitioner violated Section 8(a)(1) and (3) by terminating the various second shift employees in order to impede union activity. Pet. App. 7a-8a, 65a-68a, 86a, 90a-91a.

The latter finding by the Board is the only one that petitioner challenges in this Court (Pet. 5 n.1).[2] In disagreeing with the ALJ,[3] the Board concluded that "[t]he General Counsel made a prima facie case * * * that union animus was a motivating factor in [petitioner's] layoff of second-shift employees, and [petitioner] has failed to show by a preponderance of the evidence that those employees would

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[2]In its appeal to the Third Circuit, petitioner similarly did not contest the Board's findings that it had unlawfully established employee committees, solicited grievances, granted benefits, and promulgated no-solicitation and no-distribution rules (Pet. App. 21a).

[3]The ALJ concluded that petitioner demonstrated that it would have terminated the second shift for business reasons even in the absence of protected activity. He did not determine whether the General Counsel had made a prima facie showing that protected conduct was a motivating factor in the decision. Pet. App. 7a, 71a-72a.

have been laid off in the absence of union activity and [petitioner's] animus" (Pet. App. 92a). In reaching its decision, the Board pointed to "[t]he abruptness of the layoff, coming as it did at the time of the union drive * * *" (*id.* at 90a). In addition, after noting that petitioner's decision to eliminate the second shift was based on the recommendation of Santalla, the Board stated that "Santalla's undisputed desire to rid the second shift of its union sympathizers goes a long way in explaining how and why the second shift was eliminated in the manner in which it was" (*ibid.*). In rejecting petitioner's assertion that its decision to abolish the second shift was based on business considerations, the Board concluded that those reasons "fail[ed] to explain why [petitioner] deviated from its previous practice of considering individual seniority or qualifications" of employees to be selected for layoff rather than eliminating employees simply because they were on a particular shift (*id.* at 89a-90a (footnote omitted)). The Board added that "[c]onsidering that [petitioner's] officers * * * had discussed personnel reorganization for some time, and considering that Penney's withdrawal of further orders was not seen as catastrophic, it is not credible that [petitioner] would accept Santalla's recommendation and act upon it with such great haste" in the absence of Union activity (*id.* at 90a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 3a-21a). The court found that substantial evidence supported the Board's finding that the layoff of the second shift would not have occurred as it did were it not for petitioner's desire to impede union activity (*id.* at 19a). In so concluding, the court cited the "timing and nature of the discharge" and petitioner's knowledge of the union activity (*id.* at 14a). It stated that petitioner's explanation of the timing was "implausible" and that "the manner of implementing the abrupt layoff departed from the company's past practice of reassigning employees to other shifts" (*ibid.*). It further noted that over 90 percent of

the second shift employees had signed union authorization cards and that the union-related activities were carried out mainly by second shift employees (*id.* at 15a).[4]

The court rejected petitioner's contention that the Board's findings should be subjected to more exacting scrutiny because the Board had disagreed with the ALJ. It observed that the Board's disagreement was not over credibility determinations but over the inferences to be drawn from the facts, and that heightened scrutiny was therefore not required. Pet. App. 8a-11a.

Finally, the court rejected petitioner's claim that it should take into consideration, in reviewing the Board's decision, a ruling by a district court judge denying, in relevant part, the General Counsel's petition for interim relief pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j) (Pet. App. 17a n.1).[5] It noted that the 10(j) proceeding "[was] not under review, and hence [could not] affect [its] determination" (*ibid.*).

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[4]In addition, the court observed that the Board had not rejected petitioner's position that some form of work reduction would have resulted from the change in marketing strategy, but rather had concluded that petitioner had not shown "that the timing and nature of the reduction that did occur resulted from business reasons * * * rather than from an attempt to discourage unionization" (Pet. App. 17a-18a (citation omitted)). The court also indicated that petitioner's economic data did not support the need for an abrupt layoff, since "[t]he plant continued to be busy after the layoff, and the remaining first-shift workers were given the opportunity of working overtime '[j]ust about every day' until two to three weeks before Christmas" (*id.* at 18a (citation omitted)). The court added that the evidence did not support petitioner's assertion that "lower productivity on the second shift was the cause of its elimination" (*id.* at 19a).

[5]The petition for Section 10(j) relief was filed after the administrative hearing was held but before the ALJ's decision was rendered. It was decided based on the record of the hearing. Pet. App. 35a-36a, 41a. The district court granted the relief sought except with respect to the reinstatement of the second shift employees and the second shift supervisor. On the latter issue, the court stated that the General Counsel had "not

Judge Weis dissented. In his view, the Board's findings should have been subjected to heightened scrutiny because the Board's decision was contrary to that of the ALJ (Pet. App. 21a-22a). Examining the record, he concluded that the Board's rulings at issue were unsupported by substantial evidence (*id.* at 23a-30a). The court subsequently denied rehearing en banc (*id.* at 101a).

**ARGUMENT**

1. Petitioner asserts (Pet. 10-15) that the district court's finding in the interlocutory Section 10(j) proceeding that there was "no reasonable cause" to believe that the layoff of the second shift employees violated the Act precluded the Board, as a matter of law, from making a contrary finding in adjudicating the case on the merits, since the same record was involved. Even though this is its principal basis for seeking review by this Court, petitioner failed to raise this claim in the proceedings before the Board. To the contrary, it conceded in its brief to the ALJ (Pet. ALJ Br. 13) and again in its court of appeals brief (Pet. C.A. Br. 26) that the district court's findings were *not* binding but merely "persuasive." [6] Since petitioner failed to raise the issue at the administrative level, and since it has offered no "extraordinary circumstances" to excuse such failure, the courts may not consider the claim. See 29 U.S.C. 160(e) and (f); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

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carried his burden of reasonable cause in light of respondent's defense of legitimate business reason, and that the public interest will be best served by entrusting the issue of the reinstatement of these employees to the administrative expertise of the NLRB" (*id.* at 53a).

[6]Petitioner's brief to the Board made no mention whatsoever of the alleged preclusive effect of the district court's decision. It was not until petitioner filed for rehearing in the court of appeals that it asserted the issue-preclusion argument (Pet. for Reh'g 11-14).

In any event, petitioner's argument is without merit. The cases cited by petitioner (Pet. 11) do not support its preclusion argument or its claim of a conflict among the circuits. In *Walsh* v. *International Longshoremen's Association*, 630 F.2d 864, 868 (lst Cir. 1980), the court stated that the denial of a Regional Director's application for interim relief, while res judicata as to subsequent petitions for interim relief based on the same alleged violation, has no preclusive effect in a proceeding on the underlying charge before the Board. Similarly, in *NLRB* v. *Acker Industries, Inc.*, 460 F.2d 649 (10th Cir. 1972), the court held that a district court's findings in a 10(j) proceeding have no effect in the proceedings before the Board on the underlying complaint. The court noted (*id.* at 652) that there was a "categorical difference between the nature of an injunctive hearing and a definitive hearing on the merits." In *Cosentino* v. *Local 28*, 268 F.2d 648 (8th Cir. 1959), the court held only that the denial of a petition for interim relief because of the Board's failure to conduct a preliminary investigation before charges were filed was not an adjudication on the merits and did not bar a subsequent petition arising out of the same labor dispute. The court declined to reach the issue whether principles of res judicata were applicable to proceedings for interim relief (*id.* at 652). Finally, *National Airlines, Inc.* v. *International Association of Machinists & Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), cert. denied, 400 U.S. 992 (1971), arose under a different statute (the Railway Labor Act, 45 U.S.C. 151 *et seq.*) and has no relevance here. The court held merely that the district court was bound by the terms of a prior remand from the court of appeals that had conclusively settled the matter in dispute.

Moreover, petitioner's preclusion argument is belied by the district court's decision itself. The court made clear its understanding that it had not resolved the merits, but rather, that it was "entrusting the issue of the reinstatement

of these [second shift] employees to the administrative expertise of the NLRB" (Pet. App. 53a).[7]

2. Petitioner also asserts (Pet. 20) that the court of appeals erred in holding that the Board's decision was supported by substantial evidence. Specifically, it contends that the court "tolerate[d] the Board's premature shifting of the burden of proof" and that it failed to apply heightened scrutiny in reviewing the Board's conclusion that petitioner's elimination of the second shift was motivated by union animus. Those contentions lack merit.

In *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 395, 403-404 (1983), this Court approved the Board's *Wright Line*[8] test. Under that test, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once that is established, the employer can still avoid a finding that it violated the statute by demonstrating that the same action would have taken place even in the absence of the protected conduct. The Board properly applied that test here. It expressly found that the General Counsel made a prima facie case and that petitioner failed to prove by a preponderance of the

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[7]In a variation of its first argument, petitioner asserts (Pet. 15-17) that the failure of the court of appeals to consider the district court's findings constituted a refusal to "consider the record as a whole." That argument likewise lacks merit. District court findings with respect to applications for interim relief "are only effective to the extent they support the granting or denial of the interlocutory relief there in issue" (*Acker Industries*, 460 F.2d at 652). The reason for such a limitation is that "the purpose of the hearing [is] directed to interlocutory relief only, and the trial court [makes] its findings for that purpose only" (*ibid.*). Because of the very different purpose of a Section 10(j) proceeding, there is no basis for petitioner's assertion that the court of appeals was somehow obligated to give weight to the district court's 10(j) ruling.

[8]*Wright Line*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S 989 (1982).

evidence that it would have laid off the second-shift workers in the absence of union activity. Pet. App. 86a, 90a-92a.[9] Accordingly, there is no merit in petitioner's claim that the Board prematurely shifted the burden of proof.

Similarly, petitioner's contention (Pet. 20) that the court of appeals should have reviewed the Board's decision "under a stricter level of scrutiny" is based on its erroneous view that the Board overturned credibility findings of the ALJ. As the court of appeals noted (Pet. App. 10a), however, "the Board did not make credibility findings that differed from the ALJ" but only drew different inferences from the proven facts. Thus, under well-settled principles, there was no occasion for the court to apply a heightened level of scrutiny in reviewing the Board's decision. See, *e.g.*, *Consolidation Coal Co.* v. *NLRB*, 669 F.2d 482, 488 (7th Cir. 1982); *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977); *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495, 501 (2d Cir. 1967).

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[9]Petitioner asserts (Pet. 19) that the Board offered "no factual support for its determination" that the General Counsel made out a prima facie case, but instead "proceeded directly" to requiring petitioner to prove that it would have acted the same in the absence of union activity. As described on pages 4-5, *supra*, however, the Board set out several reasons why it found that petitioner was motivated by union animus. Petitioner's assertion (Pet. 19) of an inter-circuit conflict or a conflict with this Court's *Transportation Management Corp.* decision therefore lacks merit.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

HUNTER DOUGLAS, INC.,

*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

1. Respondent's contention that Petitioner did not assert its preclusion argument below is erroneous. In fact, Petitioner repeatedly urged consideration of the District Court's decision before the Board and later before the Court of Appeals. In its brief to the N.L.R.B., Hunter Douglas stated that:

> Given the [District] Court's finding that there is no reasonable cause to believe the Act was violated, . . . it is difficult to see how General Counsel could

> prevail on the higher threshold of preponderance of the evidence.

Pet. NLRB Br. 14.

As a logical extrapolation from that argument, Petitioner expressly asserted that "a finding should be entered that [Hunter Douglas] did not violate Section 8(a)(1) and (3) of the Act by eliminating the second shift." *Id.* Similarly, in its Reply Brief to the Third Circuit Court of Appeals and again in its Petition for Rehearing *in banc,* Petitioner argued the effect to be given the District Court's opinion in starker terms:

> Since the record provides no support for a finding of reasonable cause to believe that Hunter Douglas violated the Act . . . *a fortiori* it cannot provide support for the Board's finding that Hunter Douglas violated the Act by a preponderance of the evidence.

Pet. C.A. Reply Br. 15.

In this case, Petitioner repeatedly argued that, minimally the Board and the Court of Appeals should have accorded substantial deference to the District Court's decision. Respondent's assertion that Petitioner completely failed to raise the question of issue preclusion reflects an elevation of the term "preclusion" to talismanic status. To the contrary, use of precise terminology is not the *sine qua non* for consideration of an objection by the appellate tribunal. The purpose for the requirement that an objection be raised below is to reasonably apprise the Board of the issue and put it on notice of the likelihood that a party may later pursue that issue on appeal. *May Department Stores Co.* v. *N.L.R.B.,* 326 U.S. 376, 386 n.5 (1945); *Consolidated Freightways* v. *N.L.R.B.,* 669 F.2d 790, 795 (D.C.

Cir. 1981). *Accord N.L.R.B.* v. *Best Products Co., Inc.*, 765 F.2d 903, 904 (9th Cir. 1985); *Local 900, International Union of Electrical, Etc.* v. *N.L.R.B.*, 727 F.2d 1184, 1193 (D.C. Cir. 1984) (objection to retroactive application of N.L.R.B. decision raised although the term retroactive was not used); *cf., N.L.R.B.* v. *Blake Construction Co.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (due process objection raised though petitioner had not expressly mentioned due process). In this case, Petitioner repeatedly raised the issue of the effect to be accorded the District Court's determination that there was no reasonable cause to believe Hunter Douglas violated the Act by eliminating the second shift. Accordingly, the Board was reasonably put on notice of the likelihood that Petitioner would pursue the matter further.

2. Respondent misapprehended the purpose for which Petitioner cited the cases relied upon by the First Circuit in *Walsh* v. *International Longshoremen's Ass'n, AFL-CIO*, 630 F.2d 864 (1st Cir. 1980). In stark contrast to the Third Circuit's refusal to consider the record of the 10(j) proceeding, the First Circuit, in *Walsh*, concluded that under certain circumstances the N.L.R.B. can be precluded from deciding an issue the merits of which had been fully presented to and decided by the District Court in a 10(l) proceeding. In reaching that conclusion, the First Circuit explicitly relied upon *Madden* v. *Perry*, 264 F.2d 169 (7th Cir. 1959), *cert. denied*, 360 U.S. 931 (1959); *Consentino* v. *Local 28*, 268 F.2d 648 (8th Cir. 1959) and *N.L.R.B.* v. *Acker Industries*, 460 F.2d 649 (10th Cir. 1972), stating that "all three suggest, although they do not actually hold, that decisions under Section 10(l) would have the same preclusive effects as any other decision". *Walsh*, 630 F.2d at 868, n.6. Respondent's attempt to distinguish the hold-

ings of those cases ignores the reasons for which they were cited, i.e., their broader fundamental policy implications. Those policy implications did not escape the ken of the First Circuit, which relied upon them in reaching its decision. The Third Circuit however, did not draw the same conclusions; rather, it held that the District Court's decision had no effect whatsoever. This Court should resolve that conflict.

3. Respondent asserts that, because the Board did not make credibility findings that differed from those of the ALJ, the Court of Appeals had no occasion to apply a heightened level of scrutiny in its review of the record. Petitioner reasserts that the Board did make credibility findings and that strict scrutiny was mandated at the appellate level.* However, even assuming *arguendo,* that the Board did not make contradictory credibility findings to those made by the ALJ, the Court of Appeals was still bound to review the record with a heightened level of scrutiny. As a newly decided Fifth Circuit case holds, whenever the Board makes contradictory findings to those of the ALJ, regardless of whether they are credibility find-

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* Respondent's assertion is belied by the fact that both Respondent and the Court of Appeals conceded that the Board did indeed make such a finding when it held that Petitioner's stated motives for eliminating the second shift were "not credible." Brief in Opp. p.5. The question of motive necessarily turns on credibility and is determinative of whether an employer committed an unfair labor practice. *See Nelson* v. *Interior Board of Land Appeals,* 598 F.2d 531, 533 (9th Cir. 1979); *NLRB* v. *Colonial Haven Nursing Home, Inc.,* 542 F.2d 691, 703 (7th Cir. 1976). Accordingly, the Board necessarily judged the credibility of Petitioner's witnesses when it disbelieved their testimony concerning Petitioner's motives for eliminating the second shift. That assessment is precisely the type of contradictory finding that mandate stricter scrutiny by the Court of Appeals.

ings, the entire record "must be subjected to particular scrutiny" which "is more searching than it is when the Board and the ALJ are in agreement". *Centre Property Management* v. *N.L.R.B.*, 807 F.2d 1264, 1268 (5th Cir. 1987). Although contradictory credibility findings mandate an even more rigorous examination of the record, any contradictory findings, such as those made below by the Board, still should have been subjected to heightened scrutiny by the Court of Appeals. *Id.*

4. Respondent's brief confirms the Board's lack of understanding of the proofs required to set forth a *prima facie* case in a Section 8(a)(3) action. The Board bears the burden of proving each element of its case before the burden shifts to the employer to prove its actions were not motivated by anti-union sentiment. Respondent cites to four facts that the Board deemed to be part of General Counsel's *prima facie* case: that the layoff was abrupt, that it came at the time of the union drive, that Santalla had anti-union animus, and that Santalla had recommended the elimination of the second shift. Brief in Opp. p. 5. Santalla, howerever, was Hunter Douglas' witness, as was George Shouldis, who testified that the suggestion to terminate the second shift came from Santalla. In short, General Counsel failed to prove two of the four facts upon which Respondent relies to support the N.L.R.B.'s find of a *prima facie* case. Instead, Respondent attempts to rely on facts adduced in *Petitioner's* affirmative defense to support General Counsel's *prima facie* case. This Respondent cannot do; *Wright Line* requires General Counsel to prove its *prima facie* case *on its own case.*

Respectfully Submitted,

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